No. 01-1325-CFX Title: Washington Legal Foundation, et al., Petitioners
v.
Legal Foundation of Washington, et al.

Docketed: March 11, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Feb 1 2002	Application (01A581) to extend the time to file a petition for a writ of certiorari from February 12, 2002 to March 14, 2002, submitted to Justice O'Connor.
	Feb 5 2002	Application (01A581) granted by Justice O'Connor extending the time to file until March 7, 2002.
	Mar 7 2002	Petition for writ of certiorari filed. (Response due May 8, 2002)
	Apr 1 2002	Order extending time to file response to petition until May 8, 2002.
	Apr 30 2002	Brief amicus curiae of Pacific Legal Foundation filed.
	May 8 2002	Brief of respondents Legal Foundation and Katrin E. Frank in opposition filed.
	May 8 2002	Brief amici curiae of Citizens for Preservation of Constitutional Rights, et al. filed.
	May 8 2002	Brief of respondents Justices of the Supreme Court of Washington in opposition filed.
	May 20 2002	Reply brief of petitioners Washington Legal Foundation, et al. filed.
	May 21 2002	DISTRIBUTED for Conference of June 6, 2002
	Jun 10 2002	Petition GRANTED. SET FOR ARGUMENT December 9, 2002. **********
	Jul 19 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including August 22, 2002.
	Aug 21 2002	Brief amicus curiae of Pacific Legal Foundation filed.
	Aug 22 2002	Joint appendix filed.
	Aug 22 2002	Brief of petitioners Washington Legal Foundation, et al. filed.
	Aug 22 2002	Brief amicus curiae of National Association of Home Builders filed.
	Sep 12 2002	Order extending time to file respondents' briefs on the merits to and including October 18, 2002.
	Oct 8 2002	Motion of respondents Justices of the Supreme Court of Washington for divided argument filed.
	Oct 17 2002	Brief amicus curiae of Conference of Chief Justices filed.
	Oct 18 2002	Brief of respondents Legal Foundation of Washington, et al. filed.
	Oct 18 2002	Brief of respondents Gerry L. Alexander, Justice, et al. filed.
	Oct 18 2002	Brief amici curiae of Forty-Nine State Bar Associations, et al. filed.
	Oct 18 2002	Brief amici curiae of AARP, et al. filed.
	Oct 18 2002	Brief amici curiae of National League of Cities, et al. filed.
	Oct 18 2002	Brief amicus curiae of American Bar Association filed.

No. 01-1325-CFX

Entry	Date	Proceedings and Orders
	Oct 18 2002	Brief amici curiae of Chief Justice and Justices of Supreme Court of Texas, et al. filed.
	Oct 18 2002	Brief amici curiae of California, et al. filed.
	Oct 18 2002	Brief amicus curiae of City and County of San Francisco filed.
	Oct 23 2002	CIRCULATED.
	Oct 23 2002	LODGING consisting of twenty bound sets of two volumes of related material received from counsel for amici,AARP, et al. and distributed.
	Oct 30 2002	Record filed.
	Nov 18 2002	Motion of respondents Justices of the Supreme Court of Washington for divided argument GRANTED.
	Nov 18 2002	Reply brief of petitioners Washington Legal Foundation, et al. filed.
	Dec 9 2002	ARGUED.

Supreme Court, U.S.
FILED

No. 01-1325 MAR 07 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

152pp

QUESTIONS PRESENTED

In *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), the Court held that the interest on clients' funds held in so-called IOLTA accounts ("Interest on Lawyers' Trust Accounts") was the property of the clients. This case presents two questions:

1. Whether the regulatory scheme for funding state legal services by systematically seizing this property violates the Takings Clause of the Fifth Amendment to the Constitution so that the property owners are entitled to relief.

2. Whether injunctive relief is available to enjoin a State from committing such a violation of the Takings Clause, where the legislative scheme in issue clearly contemplates that no compensation would be paid to the owners of the interest taken, and where the small amount due in any individual case often renders recovery through litigation impractical.

PARTIES TO THE PROCEEDING

Aside from the parties named in the caption, the following were Defendants/Appellees in the court of appeals: Kevin Kelly, in his official capacity as President of the Legal Foundation of Washington; and Barbara Durham, James M. Dolliver, Richard P. Guy, and Philip A. Talmadge, in their official capacities as Justices of the Supreme Court of Washington. Those five individuals no longer serve in the capacities listed and thus are no longer parties to this proceeding.

Petitioner Washington Legal Foundation is a nonstock corporation; it has no parent corporation, and no publicly held company owns any its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Washington Legal Foundation, Allen D. Brown, Dennis H. Daugs, Greg Hayes, and L. Dian Maxwell respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (App. 1a-51a) is reported at 271 F.3d 835. The opinion of the court of appeals panel that initially heard this case (App. 52a-85a) is reported at 236 F.3d 1097. The opinion of the district court granting Respondents' motions for summary judgment and denying Petitioners' motion for summary judgment (App. 86a-96a) is not reported. The order granting *en banc* review (App. 97a) is reported at 248 F.3d 1201.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2001. On February 8, 2002, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The relevant provisions of the Fifth Amendment to the Constitution and of the Washington State Admissions to Practice Rules and Rules of Professional Conduct are set forth in the Appendix to this Petition. App. 98a-108a.

STATEMENT OF THE CASE

This case challenges the constitutionality of the Washington State IOLTA ("Interest on Lawyers Trust Accounts") program. Under that program, funds belonging to certain individuals hiring lawyers and real estate professionals in Washington are used -- without the consent and usually without the knowledge of those individuals -- to finance a variety of legal services programs. Petitioners seek review of a 7-4 *en banc* decision of the U.S. Court of Appeals for the Ninth Circuit that the IOLTA program does not violate their rights under the Takings Clause of the Fifth Amendment.

1. By an order dated June 19, 1984, the Supreme Court of Washington created the Washington IOLTA program. Pursuant to that order, the court incorporated and established Respondent Legal Foundation of Washington ("LFofW") as a nonprofit corporation, with Articles of Incorporation and Bylaws promulgated by the Court. The order also amended Disciplinary Rule ("DR") 9-102 of the Washington Code of Professional Responsibility ("CPR"), which imposed obligations on Washington attorneys regarding "Preserving Identity of Funds and Property of a Client." The amendment provided that an attorney receiving client funds that were "nominal in amount" or were "expected to be held for a short period of time" must create an unsegregated interest-bearing account (an "IOLTA account") and direct the depository institution to pay interest earned on the account to the LFofW. CPR DR 9-102(C)(1) and (4). The amendment further provided that all client funds were to be placed into the IOLTA account unless they were deposited in another interest-bearing account that resulted in the creation of "a

positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). DR 9-102(C)(3). The court subsequently replaced the Code of Professional Responsibility with the Rules of Professional Conduct ("RPC"); the provisions of CPR DR 9-102 were incorporated into RPC 1.14.[1]

Both before and after 1983, many real estate transactions in Washington have been consummated by escrow companies and title insurance companies, without the assistance of attorneys. In those cases, legal documents used to complete the transactions have been selected by trained laypersons familiar with the legal requirements of such transactions. In the early 1980s, the Supreme Court of Washington ruled that such laypersons were engaged in the unauthorized practice of law. *Bennion, Van Camp, Hagan & Ruhl v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 635 P.2d 730 (1981). That decision was controversial among some members of the state legislature, who argued that the court had exceeded its constitutional bounds by attempting to regulate a field theretofore regulated by the legislature. The court attempted to settle the controversy in 1983 by adopting Admission to Practice Rule ("APR") 12. APR 12 established a procedure whereby nonlawyers could be licensed to select appropriate legal documents for use in real estate settlements. APR 12 established a Limited Practice Board with the responsibility for licensing such LPOs (Limited Practice Officers, also known as Certified Closing Officers).

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[1] A copy of the most recent version of RPC 1.14 is set forth at App. 99a-102a.

On September 21, 1995, the Supreme Court of Washington adopted a new APR 12(h) and 12.1 in order to make LPOs subject to the IOLTA Program. APR 12(h) and 12.1 make clear that LPOs' obligations to maintain and use IOLTA accounts are identical to attorneys' IOLTA obligations.[2] APR 12(h) provides that LPOs must comply with APR 12.1. APR 12.1 in turn provides that all funds received in connection with a transaction being closed by an LPO must be placed in an interest-bearing account. The interest-bearing account must be an IOLTA account (with interest payable to the LFofW), except that the funds may be placed in a non-IOLTA interest-bearing account if and only if doing so results in the creation of "a positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). APR 12.1(c)(2) and (3).

Since IOLTA's inception in 1985, interest generated by Washington IOLTA accounts has generally amounted to between $2.5 and $4.0 million per year. App. 7a. LFofW is authorized under its Articles of Incorporation to award grants to § 501(c)(3) corporations, the only limitation on grants being that they must be for the purpose of providing legal services and education to the public in civil law matters.

2. The escrow and title insurance industries provide escrow services in Washington to buyers and sellers in connection with real estate transactions. Those services include holding customer funds in escrow accounts for a short period of time while the transactions are being completed.

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[2] Copies of APR 12(h) and 12.1 are set forth at App. 103a-108a.

Historically, escrow companies and title companies have placed customer trust funds into non-interest-bearing checking accounts. The accounts were non-interest-bearing because federal law (since the Depression) has prohibited federally-insured banks and savings and loans from paying interest on *checking* accounts. *See* 12 U.S.C. §§ 371a, 1464(b)(1)(B), 1828(g). *See also* Declaration of Gerald R. Wheeler ¶ 5, App. 110a.[3] Federal restrictions on interest payments by financial institutions have been relaxed somewhat since 1980, so that banks are now authorized to offer Negotiable Order of Withdrawal (NOW) accounts, which operate like traditional checking accounts yet are not considered "demand" accounts and thus are permitted to pay interest. 12 U.S.C. § 1832. However, escrow and title companies have never deemed NOW accounts to be realistic options for their trust funds due to the difficulty in crediting the proper amount of interest to each person whose funds have passed through the escrow account. App. 110a. Another reason that NOW accounts have not been employed is that they may not be used for funds belonging to a for-profit corporation, and escrow and title companies on occasion handle corporate funds. 12 U.S.C. § 1832(a)(2); App. 110a.

Although banks have not paid interest on escrow accounts, in lieu thereof they have provided what are referred to in the industry as "earnings credits." App. 111a. These credits can generally be applied against fees that would otherwise be payable to the bank for a wide variety of

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[3] The Wheeler Declaration, set forth at App. 109a-112a, was attached to the motion for summary judgment filed by Petitioners in the district court.

services rendered by the bank. *Id.* Such credits directly reduce costs to customers for services, including escrow trust accounting services and wire transfers. *Id.*

The adoption of APR 12(h) and 12.1 has significantly altered that historical practice. APR 12.1 provides that all funds received in connection with a transaction being closed by an LPO must be placed in an interest-bearing account; as a practical matter, that requires placing the funds into an IOLTA account with interest payable to LFofW. Following the adoption of APR 12(h) and 12.1, many Washington banks have been unwilling to offer earnings credits on escrow accounts. In the absence of such credits, bank customers are now paying for many services that formerly were "free" (in the sense that earnings credits generally were more than sufficient to offset charges for such services). App. 111a. Some or all of those costs inevitably are passed along by escrow and title companies to their customers. App. 112a. Some escrow companies have taken to including those bank charges as a separate item on closing statements. *Id.* Others simply include the bank charges as part of general overhead costs; since overhead costs are a major factor in determining a company's pricing structure, the bank charges ultimately are borne in whole or in part by escrow customers. *Id.*

3. Petitioners Allen D. Brown and Greg Hayes regularly purchase and sell real estate as part of their business dealings. In connection with recent real estate transactions, they have placed their funds in the custody of their escrow companies, and those companies (without the consent of Petitioners) deposited the funds into IOLTA accounts. App. 14a.

Petitioner Dennis H. Daugs owns and operates a small escrow company in Federal Way, Washington. He regularly holds client funds entrusted to him in connection with real estate transactions. App. 15a. As a licensed LPO, he is subject to APR 12.1. Mr. Daugs has determined, however, that compliance with APR 12.1 and payment to LFofW of interest income belonging to his clients would violate his fiduciary obligations to his clients to protect their property. Accordingly, he has refused to participate in the IOLTA program, thereby exposing himself to potential disciplinary action.

Petitioner L. Dian Maxwell is employed by Pacific Northwest Title Company of Washington ("PNW Title"), which provides escrow services in connection with real estate closings. Up until 1996, Ms. Maxwell was a licensed LPO. After Rule 12.1 was adopted, PNW Title determined that it could avoid being subject to the IOLTA program (and thus could save the estimated $50 per transaction cost of participating in the IOLTA program) by requiring all of its employees involved in real estate closings to surrender their LPO licenses. App. 16a.[4] In order to keep her job, Ms. Maxwell surrendered her license. *Id.*

Petitioner Washington Legal Foundation ("WLF") is a public interest law firm whose members include several of the other Petitioners, as well as Washington citizens similarly situated to the other Petitioners.

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[4] Because PNW Title no longer employs LPOs, its customers now must employ outside counsel to prepare the form legal documents used in connection with real estate transactions.

4. Petitioners filed this action in January 1997 in U.S. District Court for the Western District of Washington, alleging that the IOLTA program violated their rights under the First and Fifth Amendments. Named as defendants were LFofW, its President, and the nine justices of the Supreme Court of Washington -- sued in their official capacities only.

In January 1998, the district court issued an Order and Judgment granting Respondents' motions for summary judgment and denying Petitioners' motion for summary judgment. App. 86a-96a. The district court stated that the existence of a property right in IOLTA interest was "a prerequisite to establishing either a First or Fifth Amendment claim." *Id.* at 92a. The court held that Petitioners lacked any property rights in the IOLTA interest and, accordingly, dismissed their constitutional claims. *Id.* at 94a. The court also rejected Petitioners' alternative claim that the IOLTA program violated their Fifth Amendment rights by failing to compensate them for the use of their funds. *Id.* at 96a.

In January 2001, a Ninth Circuit panel reversed.[5] App. 52a-85a. The panel determined that the interest income in IOLTA accounts belongs to those whose funds generated the income, and that "a government appropriation of that interest for a public purpose is a taking entitling them to just compensation under the Fifth Amendment." App. 85a. The panel remanded the case to the district court for determi-

[5] While the appeal was pending, this Court issued its decision in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). *Phillips* held, in a case involving the Texas IOLTA program, that interest earned on IOLTA accounts belongs to those whose funds generated the interest.

nation of an appropriate remedy. *Id.* Rejecting Respondents' argument that the IOLTA program could be upheld under the *ad hoc* approach to Takings Clause claims articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the panel stated, "When the government permanently appropriates all of the interest on IOLTA trust funds, that is a *per se* taking, as when it permanently appropriates by physical invasion of real property." App. 77a (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)). The panel rejected Respondents' argument that the Takings Clause provides greater protection against government interference with real property rights than against government expropriation of intangible personal property. The panel stated, "This [argument] would imply the nonsensical proposition that a taking would *less* readily be found if a state entirely confiscated people's money from their bank accounts or IRA's than if it installed a sign on their land." App. 74a.

On May 9, 2001, the Ninth Circuit granted Respondents' petition for rehearing *en banc* and vacated the panel decision. App. 97a. On November 14, 2001, the *en banc* appeals court voted 7-4 to affirm the district court in part, vacate in part, and remand. Initially, the court *sua sponte* addressed Petitioners' standing. The court held that Respondents had confiscated funds belonging to Petitioners Brown and Hayes and thus that those two Petitioners had standing to challenge the IOLTA program. App. 14a.

The court also held that Petitioners Daugs, Maxwell, and WLF lacked standing because Washington had not confiscated any property belonging to them, and thus they had no basis for claiming compensation. App. 15a-19a.

Those Petitioners had never, in fact, sought compensatory relief; rather, they had sought injunctive relief. The court's apparent confusion on this point ended up having no effect on its ultimate disposition of their claims, however, because the court held that the injunctive relief sought by Petitioners Daugs, Maxwell, and WLF is not available in Takings Clause cases: "[T]he remedy for the Fifth Amendment violation alleged here is to provide the property owner with just compensation, if a taking has occurred." App. 19a.

Turning to the merits, the court held that Petitioners Brown and Hayes were, indeed, the owners of the interest earned on their IOLTA funds, and it vacated the district court's holding to the contrary. The court rejected Respondents' efforts to distinguish *Phillips*, holding that any differences between Texas and Washington property law with respect to ownership of interest income were "immaterial." App. 24a. The court nonetheless held that Respondents' confiscation of Petitioners' property did not violate the Takings Clause. First, the court concluded that Petitioners' Takings Clause claims should be judged under the *ad hoc* method of analysis outlined in *Penn Central* rather than the *per se* analysis outlined in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). App. 27a-32a. The court said, "The *per se* analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money." App. 27a. The court thought that application of the *ad hoc Penn Central* approach was especially appropriate in this case because: (1) the property being confiscated from Petitioners was being used to promote the common good, App. 29a; and (2) "Given the highly-regulated nature of the banking industry, individuals should expect that their

commercial transactions, including their bank deposits, will be regulated." App. 31a.

The court noted that courts applying an *ad hoc* analysis often look to three factors in determining whether a taking has occurred: (1) the economic impact of the government's action; (2) the extent of interference with investment-backed expectations; and (3) the character of the governmental action. App. 32a. Applying those factors, the court concluded that the expropriation of Petitioners' property did not violate the Takings Clause because: (1) the expropriation had no economic impact on Petitioners Brown and Hayes since the expropriated interest would not have come into existence but for the IOLTA program and they had not proven that they were affected by the loss of "earnings credits" on the escrow accounts, App. 33a-38a; (2) the expropriation did not interfere with their "investment-backed expectations" since they could not have expected to earn interest on their funds in the absence of IOLTA, App. 38a-39a; and (3) the "character of the government action" could best be "viewed as a regulation of the uses of Brown's and Hayes's property consisting of the principal and the accrued interest in aggregation," not as a confiscation of 100% of the interest income. App. 39a. The court concluded, in light of the highly regulated nature of banking transactions and the ethical obligations of lawyers and LPOs to assist in providing legal services to the indigent, "the IOLTA regulations are not out of character for either the commercial industry or the professions they affect." App. 40a.

Applying the same analysis that led it to conclude that no taking had occurred, the court went on to find, in the alternative, "We . . . hold that even if the IOLTA program

constituted a taking of Brown's and Hayes's private property, there would be no Fifth Amendment violation because the value of their just compensation is nil." App. 45a.

The court recognized that by vacating the district court's holding that Petitioners lacked property rights in the IOLTA interest, it had revived Petitioners' First Amendment claims. Rather than addressing the merits of those claims, the court remanded them for initial consideration in the district court. *Id.*

Judge Kozinski dissented, joined by Judges Trott, Kleinfeld, and Silverman. App. 45a-51a. Judge Kozinski argued that this Court's *Phillips* decision required application of *per se* takings analysis to the expropriation of Petitioners' property; he asserted, "*Penn Central*'s *ad hoc* approach deals with regulatory takings -- a difficult and vexing corner of takings law." App. 48a. He endorsed the panel's conclusion that Respondents' actions constituted a compensable taking of Petitioners' property, stating, "[I]t . . . strikes me as peculiar and quite dangerous to say that the government has greater latitude when it takes money than when it takes other kinds of property." App. 50a.

REASONS FOR GRANTING THE WRIT

This case presents important questions of law concerning the Takings Clause of the Fifth Amendment, questions that have divided the courts of appeals. This Court should grant review of the two questions presented.

First, the decision below conflicts with that of the U.S. Court of Appeals for the Fifth Circuit in *Washington Legal*

Found. v. Texas Equal Access to Justice Found. ["*TEAJF*"], 270 F.3d 180 (5th Cir. 2001), on the issue of whether IOLTA programs effect an unconstitutional taking. In *TEAJF*, the Fifth Circuit had before it a Takings Clause challenge to the Texas IOLTA program, a program identical to the Washington IOLTA program in all relevant respects. The Fifth Circuit resolved the issues in the case in a manner diametrically opposed to the court below, holding that Texas's uncompensated expropriation of client funds in connection with its IOLTA program constituted a *per se* violation of the Takings Clause. *Id.* at 186.

IOLTA programs are now in existence in all 50 States and the District of Columbia. Collectively they raise between $100 million and $150 million each year. Yet although millions of Americans have had their funds expropriated to support IOLTA programs, most are not even aware of IOLTA's existence. The Fifth Circuit's decision striking down the Texas program has now called into question the constitutionality of IOLTA programs throughout the country.

Further, the decision below is demonstrably incorrect under existing decisions of this Court. The court below refuses to take seriously a number of this Court's decisions including *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); *United States v. Sperry Corp.*, 493 U.S. 52 (1989); and *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998). Indeed, as the Ninth Circuit's many citations show, it relied not on this Court's decision in *Phillips* but on the dissent from that decision. *See, e.g.*, App. 10a, 32a, 42a.

Grant of certiorari is necessary because the decision of the Ninth Circuit is inconsistent with the teachings of this Court and because it is in direct conflict with the decision of the Fifth Circuit on the constitutionality of IOLTA programs in particular, and more generally on the proper analysis of government programs that confiscate money.

Second, the decision below creates a second, substantial conflict in the circuits by its ruling that prospective injunctive relief is not an appropriate remedy in the event that the IOLTA program results in a Takings Clause violation. This decision is in conflict with the Fifth Circuit's ruling in *TEAJF*, which ordered entry of injunctive relief against IOLTA's continued violations of the Takings Clause. It is also in conflict with decisions of the Second and D.C. Circuits holding that injunctive relief is available in cases where takings result from government action involving direct transfer of money. The Ninth Circuit's narrow view of the availability of injunctive relief is also in conflict with this Court's cases which permit injunctive relief where there is no reasonable, certain, or adequate monetary remedy. The Court should grant certiorari on this issue as well.

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT IN THE CIRCUITS OVER WHETHER EXPROPRIATION OF IOLTA FUNDS CONSTITUTES A FIFTH AMENDMENT TAKING

A. The Ninth Circuit's Decision That IOLTA Effects No Unconstitutional Taking Directly Conflicts with the Fifth Circuit's *TEAJF* Decision

The court below held that the Washington IOLTA program's expropriation of Petitioners' property should be examined, for purposes of ruling on Petitioners' Takings Clause claims, using a *Penn Central ad hoc* analysis. App. 27a-32a. The court then determined that that expropriation did not constitute a Fifth Amendment taking and, alternatively, that Petitioners suffered no loss and thus were entitled to no Fifth Amendment compensation. App. 40a, 41a. Each of those rulings is in direct conflict with the Fifth Circuit's *TEAJF* decision, which struck down the nearly identical Texas IOLTA program. The Court should grant review in order to resolve that conflict.

The plaintiffs in *TEAJF* raised a Takings Clause challenge to the Texas IOLTA program that is identical to the challenge raised by Petitioners. Although the Texas IOLTA program applies only to trust funds held by attorneys while the Washington IOLTA program applies to real estate escrow funds as well, that distinction is immaterial to the constitutional analysis. Indeed, the Ninth Circuit repeatedly made clear that it did not distinguish, for purposes of Takings Clause analysis, between IOLTA programs that apply only to attorney trust funds and Washington's more expansive

IOLTA program. *See, e.g.*, App. 25a (*Phillips*'s analysis of Takings Clause issues under the Texas IOLTA program is fully applicable to Petitioners' real estate escrow funds), App. 33a.

Moreover, the Ninth Circuit made no effort to distinguish the Fifth Circuit's *TEAJF* decision on those or any other grounds. The Ninth Circuit explicitly disagreed with *TEAJF*'s conclusion that the Texas IOLTA program was subject to a *per se* takings analysis:

> [G]iven the monetary nature of the property in question, the public nature of the IOLTA program, and the highly regulated nature of the banking industry, we believe that the better approach [than the Fifth Circuit's "*per se* method of analysis"] is that of *Penn Central*.

App. 31a.

The Ninth Circuit's conclusion -- after examining the Washington IOLTA program using a *Penn Central* analysis -- that the program does not constitute a taking, App. 40a-41a, is also in direct conflict with *TEAJF*. Given the Fifth Circuit's conclusion that *per se* takings analysis was applicable, there was no need for it to undertake an explicit *Penn Central* analysis. *See TEAJF*, 270 F.3d at 186-188. Nonetheless, the Fifth Circuit clearly believed that the Texas IOLTA program effected an uncompensated taking of private property regardless whether it was examined using a *per se* or *Penn*

Central analysis, because every *per se* taking would necessarily be a taking if analyzed under *Penn Central*.[6]

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[6] As the Court explained in *Lucas*, government action generally is deemed a *per se* taking in two situations: (1) where the government confiscates or physically invades private property; or (2) where regulation denies all economically beneficial or productive use of land. *Lucas*, 505 U.S. at 1015. In such cases, "'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative." *Loretto*, 458 U.S. at 426. In other words, there is no need to go through a full-fledged *Penn Central* analysis in such cases; but even if one did so, one would still conclude that the government action effected a Fifth Amendment taking because one of the three principal factors examined in any *Penn Central* analysis (the "character of the government action" factor) would point so strongly in the direction of finding a taking. It follows from the rationale of *Lucas* and *Loretto* that every *per se* taking is also a taking when analyzed under *Penn Central*.

In undertaking its *Penn Central* analysis and addressing the "character of government action," the Ninth Circuit determined that Washington's confiscation of Petitioners' property could best be viewed "as a regulation of the uses of Brown's and Hayes's property, consisting of the principal and interest in aggregation." App. 39a. That peculiar characterization of Washington's actions (deeming confiscation of property to be no more than a form of "regulation") threatens to transform *Penn Central* analysis into the toothless check on government powers that some critics already contend that it is. The Court has expressed an interest in "restor[ing] balance to [the *Penn Central*] inquiry." *Palazzolo v. United States*, 121 S. Ct. 2448, 2467 (2001) (O'Connor, J., concurring). Petitioners submit that, should the Court ultimately determine that IOLTA programs should be examined under the *Penn Central* framework, this case would provide an ideal occasion to restore balance to the *Penn Central* analysis by making clear that government confiscation of property should not be characterized as mere "regulation" of the property.

Finally, the Ninth Circuit's holding that Petitioners suffered no compensable loss (and thus that there was no Fifth Amendment violation even if the IOLTA program constituted a taking of their property) is also in direct conflict with *TEAJF*. The Ninth Circuit based its "no compensable loss" finding on its conclusion that Petitioners were no worse off than if, hypothetically, they had been permitted to keep their funds out of the IOLTA program. App. 44a. In contrast, the Fifth Circuit in *TEAJF* assumed for the sake of argument that the plaintiffs could not have benefitted financially by opting out of the Texas IOLTA Program, *TEAJF*, 270 F.3d at 189 n.10; but it nonetheless concluded both that a Fifth Amendment taking of the plaintiffs' property had occurred and that the taking amounted to a loss that entitled plaintiffs to injunctive and declaratory relief. *Id.* at 189-194.

The defendants in *TEAJF* filed a motion for rehearing *en banc* on October 26, 2001, and the Fifth Circuit has not yet ruled on the motion. Nonetheless, the conflict between the Fifth and Ninth Circuit is not made any less stark by the pendency of that motion. Unless the Court grants review in this case, attorneys and bar authorities across the country will continue to be in a quandary regarding whether IOLTA programs violate the Fifth Amendment.[7] At most, the pendency of the motion for rehearing *en banc* suggests that

[7] Not surprisingly, given the conflicting Fifth and Ninth Circuit decisions, the constitutionality of IOLTA programs has become a hotly debated topic in States throughout the country. For example, a Fifth Amendment challenge to the Massachusetts IOLTA program was recently filed in federal district court in Massachusetts. *See Citizens for the Preservation of Constitutional Rights, Inc. v. Marshall*, No. 02-cv-10125MLW (D. Mass., filed Jan. 23, 2002).

the Court may wish to defer consideration of this Petition until the Fifth Circuit rules on the motion.

B. The Ninth Circuit's Decision That No Taking Occurred Is Inconsistent with the Decisions of This Court

Review is warranted for the additional reason that the Ninth Circuit's decision that no compensable taking occurred is plainly inconsistent with this Court's decisions. The court below was unable to point to a single decision of this Court for the proposition that the government may confiscate private property with a readily ascertainable value and yet not be required to pay compensation to the owners of that property.

The court below viewed as decisive its factual finding that Petitioners could not have derived any financial benefit from opting out of the IOLTA program. That ruling cannot be squared with *Phillips*, which is replete with language indicating that establishing a Takings Clause claim is not dependent on a showing that the plaintiff could benefit by opting out.[8] Although noting that "[w]hether client funds

[8] Indeed, the Question Presented in *Phillips*, as reframed by the Court, stated:

> Is interest earned on client trust funds held by lawyers in IOLTA accounts a property interest of the client or lawyer, cognizable under the Fifth Amendment of the United States Constitution, despite the fundamental precept of IOLTA that such funds, absent the IOLTA program, could *not* earn interest for the client or lawyer.

(continued...)

held in IOLTA accounts could generate net interest is a matter of some dispute," *Phillips* stated that that dispute was not relevant to its determination. *Phillips*, 524 U.S. at 169. The Court explained:

> We have never held that a physical item is not "property" simply because it lacks a positive economic or market value. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), we held that a property right was taken even when infringement of that right arguable *increased* the market value of the property at issue. *Id.* at 437 n.15.

Id. at 169-70. If the infringement in *Loretto* was found to be a taking despite evidence that the infringement *increased* the value of the property at issue, then surely Petitioners' takings claims cannot be defeated by a factual finding that they could not have generated net interest on their funds in the absence of the IOLTA program.

The decision below is also inconsistent with *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), a case whose fact pattern is remarkably similar to *Phillips* and this case. *Webb's* involved interest earned on funds being held in a Florida court registry in connection with an insolvency proceeding. The court deposited the funds in an interest-bearing account and attempted to keep the interest for itself. This Court held that the Florida court violated the Takings Clause by failing to distribute the interest to those later adjudged to have valid claims to the funds in the court

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[8](...continued)
521 U.S. 1117 (1997) (emphasis added).

registry. *Webb's*, 449 U.S. at 162. *Webb's*' conclusion that Florida's expropriation of money without compensation violated the Takings Clause cannot meaningfully be distinguished from this case. *Webb's* held that the claimants (200 putative creditors of an insolvent company) were entitled to compensation under the Takings Clause for the interest earned on their funds, even though the claimants had no way of earning interest on their own -- as *Webb's* recognized, Florida would have been within its rights to have kept the funds in a non-interest-bearing account and thus earned no interest. *Id.* The court below did not attempt to explain how its decision that no taking had occurred and no compensation was required could be squared with *Webb's*.

In support of its position, the Ninth Circuit relied on *United States v. Sperry Corp.*, 493 U.S. 52 (1989). App. 27a. But as *TEAJF*, the Ninth Circuit panel, and Judge Kozinski's dissent all pointed out, *Sperry* provides no support for the Ninth Circuit's distinction between government confiscation of real and personal property. *TEAJF*, 270 F.3d at 187 (*Sperry* bars application of *per se* analysis only in cases in which the government is imposing a fee for services rendered); App. 49a-50a; App. 74a-75a. Indeed, this Court held in *Phillips* that *Sperry* is inapplicable in Takings Clause cases where, as here, the government does not contend that its confiscation of money is designed to ensure payment for services rendered:

> Our holding does not prohibit a State from imposing reasonable fees it incurs in generating and allocating interest income. *See* [*Webb's*, 449 U.S.] at 162; cf. *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989) (upholding the imposition of a "reasonable 'user fee'"

> on those utilizing the Iran-United States Claims Tribunal). But here the State does not, indeed cannot, argue that its confiscation of respondents' interest income amounts to a fee for services performed.

Phillips, 524 U.S. at 171.

The Ninth Circuit's holding that Petitioners are not entitled to any compensation for the expropriation of their money is also at odds with numerous decisions of this Court. *See, e.g., Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 164 (1980); *United States v. Pewee Coal Co.,* 341 U.S. 114, 118 (1951) (plurality opinion). In support of its holding, the court below cited a series of cases in which this Court has considered how to compute the value of property taken by the government. App. 41a-45a. These cases have held that where the value of the property taken is subject to question (as will often be true of real property), compensation is to be based on the loss suffered by the property owner, not the benefit derived by the government. *See, e.g., Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189, 195 (1910). But that line of cases has no relevance here, where the property taken is money and thus has a readily ascertainable value. In addition, as the Court noted in *Phillips*, "valuable rights . . . inhere in . . . property," and such rights are protected under the Takings Clause even if the owner could not realize income from the exercise of those rights. *Phillips,* 524 U.S. at 170.

In short, the decision below is wrong and is at odds in almost every conceivable way not only with the Fifth Circuit's *TEAJF* decision but also with numerous decisions of this Court. This Court's review is necessary.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER EQUITABLE RELIEF IS AVAILABLE IN CERTAIN TAKINGS CASES

A. There is a Split in the Circuits Over the Availability of Equitable Relief for Governmental Takings that Result From Compelled Transfers of Money

The *en banc* court below held that "prospective injunctive relief is an inappropriate remedy" in this case, and thus that WLF lacked standing to pursue claims for declaratory and injunctive relief. App. 17a-19a.[9] The court held that WLF could not seek to enjoin the IOLTA program on behalf of its members because the only "appropriate relief" was the determination of just compensation, which "necessarily require[d] the participation of the individual members . . . ." App. 19a.

While acknowledging that "equitable relief may be available under other circumstances in a takings case," the Ninth Circuit briskly dismissed the appropriateness of such relief here with the unexplained citation of two cases.[10] The

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[9] The court similarly found that Petitioners Daugs and Maxwell lack standing because they have no claim for (and are not seeking) monetary relief, the only form of relief (in the court's view) available in Takings Clause claims of this sort. App. 15a-17a.

[10] The citations to this Court's decision in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) and to *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992), do not suggest a reason for denying access to

(continued...)

court neither defined the circumstances in which such relief is available nor engaged in any detailed analysis of whether, in this case, compensation would adequately remedy the alleged violation of Fifth Amendment rights. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984).

The Ninth Circuit's determination that equitable relief is not an appropriate remedy in this case is in direct conflict with the Fifth Circuit's decision in *TEAJF*. There, in a similar challenge to the Texas IOLTA program, the court held that equitable relief was the most appropriate remedy because "the very purpose of the program would be thwarted" if the program were allowed to continue but then Texas were required to provide compensation. *TEAJF*, 270 F.3d at 194. The Fifth Circuit cited this Court's plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), in support of its conclusion that the plaintiffs could seek equitable relief; it held that Texas could not possibly have intended, if its IOLTA program were later determined to violate the Fifth Amendment, to continue to collect funds that would then immediately be refunded as Takings Clause

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[10](...continued)
equitable relief here. *Duke Power* involved a challenge to a statute in a case where, as this Court held, declaratory relief was certainly proper given the inadequacy of the statutory damage remedy available. In *Transohio*, the D.C. Circuit held that plaintiffs had no property interest to be "taken" by the government, *id.* at 613, and stated in dicta that "injunctive relief [is available] in the few cases where a Claims Court remedy is so inadequate that the plaintiff would not be justly compensated." *Id.* (quotations omitted). This cursory and opaque treatment of the issue by the Ninth Circuit ignored substantial reasons, apparent from this Court's cases and discussed below, for finding that equitable relief is available in cases such as this one.

compensation: "because the purpose of IOLTA is to take the interest generated from client-funds and use it to fund legal services for the indigent, it is obvious that the program makes no provision for payment of just compensation." *Id.*

The Ninth Circuit's decision also conflicts with the decisions of two other circuits that equitable relief is available in cases where the legislative scheme at issue requires a direct transfer of money. In *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995), the Second Circuit held that it had jurisdiction over claims for equitable relief in a challenge to the Coal Industry Retiree Health Benefit Act which required former coal companies to contribute to healthcare plans for retired miners. The court drew a distinction between statutes which burden real or tangible property, and "those requiring direct transfers of money to the government." *Id.* at 493. "We hold that where the challenged statute requires a person or entity to pay money to the government, it must be presumed that Congress had no intention of providing compensation for the deprivation through the Tucker Act. Common sense dictates such a presumption." *Id.*

In *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 402 (D.C. Cir. 1997), the D.C. Circuit followed the reasoning of *Chateaugay* and held that equitable relief was available "in cases involving straightforward mandates of cash payment to the government." It found that although suits for compensation under the Tucker Act may be an appropriate remedy where the government has taken property, district courts retain equitable jurisdiction to remedy takings involving "'direct transfers of money to the government.'" *Id.* (citations omitted).

Accordingly, there is a split in the Circuits, between the Fifth, Second and D.C. Circuits, on one hand, and the Ninth Circuit, on the other, on whether equitable relief is available for governmental takings involving the direct transfer of money. Given the recurring nature of this issue, this Court should grant certiorari to ensure that citizens of all States enjoy the same remedial rights with regard to governmental takings of money.

B. The Decision Below is Contrary to the Decisions of this Court, Which Recognize the Availability of Equitable Relief in the Absence of a Reasonable, Certain and Adequate Damage Remedy

The decision below is wrong, because it fails to heed this Court's directive that equitable relief is appropriate in takings cases where there is no "reasonable, certain and adequate provision for obtaining compensation" from the government. *Cherokee Nation v. S. Kansas R. Co.*, 135 U.S. 641, 659 (1890). This principle has sometimes led to the denial of any equitable relief where an adequate remedy to secure compensation existed. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984); *Presault v. Interstate Commerce Comm.*, 494 U.S. 1, 13 (1990). However, it has also led this Court to make clear that equitable relief is available where compensation is uncertain, inadequate, or entirely unavailable, in view of all of the circumstances.

For example, in *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978), plaintiffs challenged the Price Anderson Act on the grounds that "in the event of a nuclear accident their property would be 'taken' without any

assurance of just compensation." *Id.* at 69. This Court found that it had jurisdiction over claims for declaratory relief brought "before potentially uncompensated damages are sustained" because "the Price-Anderson Act does not provide advance assurance of adequate compensation in the event of a taking . . . ." *Id.* at 71 n.15. Although *Duke Power* clearly presents a dramatic case for equitable relief, this Court has not limited equitable relief to the unique circumstance of potential danger from a nuclear accident.

Like the Second, Fifth, and D.C. Circuits, this Court has also granted equitable relief in cases involving statutory schemes requiring the direct transfer of the property-owners' money. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court reviewed a Florida statute which permitted the clerk of the court to retain interest accrued on funds of private persons held in interpleader accounts. Describing its task as the determination of "whether the second exaction by Seminole County amounted to a 'taking' -- it was obviously uncompensated -- within the Amendment's proscription," *id.* at 160, the Court struck the statute down as unconstitutional.[11]

The Court's reasoning in allowing declaratory and/or injunctive relief in takings cases involving monetary transfers

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[11] Similarly, in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1985), and *Concrete Pipe and Products v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993), two cases dealing with contributions mandated by the Multiemployer Pension Plan Amendments Act, the Court appeared to proceed on the premise that equitable relief was available to remedy any taking, when it asserted jurisdiction over the claims for injunctive and declaratory relief. In both cases, the Court ultimately found no unconstitutional taking.

was made explicit by the plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Eastern sought a declaratory judgment finding the Coal Act's requirement that certain coal companies fund health plans for retired miners violated the Constitution. The plurality found that equitable relief was available because a suit for compensation was not:

> In cases such as this one, it cannot be said that monetary relief against the Government is an available remedy. . . . Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act, for '[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation.' *In re Chateaugay Corp.*, 53 F.3d at 493. . . . In that situation, a claim for compensation 'would entail an utterly pointless set of activities.' *Student Loan Marketing Assn. v. Riley*, 104 F.3d 397, 401 (C.A. D.C. 1997).

Id. at 521. The plurality held that equitable relief was appropriate under the circumstances. *Id.* at 522.

The rationale of *Eastern Enterprises*, under which damages are an inadequate remedy and injunctive relief is appropriate when a government program takes money outright to support governmental objectives, is directly applicable here. The Fifth Circuit was correct in concluding that the IOLTA program "makes no provision for payment of just compensation." *TEAJF*, 270 F.3d at 194. Indeed, "[i]f the interest earned on client-funds were available as just compensation for the clients, the very purpose of the program would be thwarted; therefore, it would defy logic, to say the least, to presume the availability of a just compensation

remedy." *Id.* Equitable relief is thus appropriate in this case where the IOLTA program effects a direct transfer of the property-owners' interest.

No reasonable, certain and adequate compensation remedy exists here for the additional reason that the amount at issue is so minimal as to make a legal action for damages impractical. In that situation, the only effective remedy for such a pattern of governmental conduct is invalidation of the practice in issue. This Court appears to have recognized that fact in *Babbitt v. Youpee*, 519 U.S. 234, 245 (1997), where the Court granted declaratory relief and struck down the Indian Land Consolidation Act, which eliminated the ability of tribe members to pass fractional interests in property upon their deaths, mandating that the fractional interests would pass instead to the tribe. The statute specifically targeted small fractional interests -- those that constituted less than 2% of the total acreage of the parcel and that were incapable of earning more than $100 in a year, *id.* at 240-41 -- and it appears that because these interests were so small, individual tribe members could not practicably sue to recover compensation for the value of the land thus taken. In that circumstance, the Court did not require each member of the tribe to seek compensation; it granted equitable relief to enjoin the takings in the first place.

The same reasoning applies here. Under IOLTA, the government confiscates small amounts of interest -- amounts so small that the costs of litigation will often, if not always, exceed the amount of any individual recovery. In such a case, it is likewise fair to conclude that no damage remedy is practicably available, and equitable relief must be available

to prevent government action amounting to a systematic and deliberate taking.

Other circumstances can be imagined which justify the conclusion that an equitable remedy must be available for a constitutional taking.[12] Contrary to the suggestion of the court below, the range of such situations is neither mysterious nor extraordinarily narrow. It is rather simply those cases in which it can fairly be said, under all the circumstances, that there is no reasonable, certain and adequate compensation remedy available to takings claimants. This Court should grant certiorari to clarify that equitable relief is certainly available on the facts presented here, and thus that all Petitioners should be permitted to go forward with their Fifth Amendment claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] For example, a state actor's failure to waive sovereign immunity or immunity from federal court suit under the Eleventh Amendment, may be one such circumstance rendering suits for compensation either unavailable or impractical. In this regard, Petitioners note that Respondents raised the Eleventh Amendment as an affirmative defense in their answer to the complaint, and they have never explicitly waived that defense.

Respectfully submitted,

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Date: March 7, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35154

D.C. No. CV-97-00146-JCC

WASHINGTON LEGAL FOUNDATION; ALLEN D. BROWN; DENNIS H. DAUGS; GREG HAYES; L. DIAN MAXWELL,
Plaintiffs-Appellants,

v.

LEGAL FOUNDATION OF WASHINGTON; KEVIN F. KELLY; BARBARA DURHAM, Chief Justice; GERRY L. ALEXANDER, Justice; JAMES M. DOLLIVER, Justice; RICHARD P. GUY, Justice; CHARLES WAYNE JOHNSON, Justice; BARBARA A. MADSEN, Justice; CHARLES Z. SMITH, Justice; PHILIP A. TALMADGE, Justice,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge Presiding

Rehearing En banc Granted May 9, 2001

Argued and Submitted En Banc
June 21, 2001 -- San Francisco, California

Filed November 14, 2001

Before: Mary M. Schroeder, Chief Judge, Harry Pregerson, Alex Kozinski, Stephen S. Trott, Andrew J. Kleinfeld,

A. Wallace Tashima, Barry G. Silverman,
Kim McLane Wardlaw, Raymond C. Fisher,
Marsha S. Berzon, and Johnnie B. Rawlinson,
Circuit Judges

Opinion by Judge Wardlaw
Dissent by Judge Kozinski

WARDLAW, Circuit Judge:

Four individuals, Allen Brown, Greg Hayes, Dennis Daugs, and Dian Maxwell, and the Washington Legal Foundation (collectively "Appellants") challenge the legality of Washington State's Interest on Lawyers' Trust Account ("IOLTA") program on First and Fifth Amendment grounds. Beginning where the Supreme Court left off in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 1605 (1998), Appellants contend that the Washington State IOLTA program unconstitutionally takes the interest generated by their monies placed in IOLTA trust accounts and compels speech. We review this case en banc to consider whether there has been an unconstitutional taking, i.e., a taking without just compensation, of property belonging to Appellants. In doing so, we reject the analytical approach that "trifurcates" the Fifth Amendment issues, previously taken of procedural necessity or otherwise by other courts. Believing the better approach to be consideration of the Fifth Amendment question as a whole, we must decide whether the State of Washington, by establishing its IOLTA program and applying it to Limited Practice Officers, took property belonging to any of the five Appellants without providing just compensation therefor. We analyze this issue in accordance with the dictates of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), and hold that with respect to the funds deposited into client trust

accounts by the Limited Practice Officers in this case, there has been no taking of property without just compensation in violation of the Fifth Amendment. U.S. Const. amend. V. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court with respect to Appellants' Fifth Amendment claim. Because the district court did not have the opportunity to consider Appellants' First Amendment claim in light of *Phillips*, however, we vacate the judgment on that claim and remand for further proceedings.

I. IOLTA

When a lawyer takes the oath of a state bar, he receives the great privilege of admission to the practice of law in that state and pledges to conduct himself in accordance with the code of professional responsibility that accompanies such an honor. Of the many ethical requirements placed upon lawyers, one of the most significant is loyalty to the client. In addition to representing their clients zealously and protecting their legal rights, lawyers must protect the integrity of their clients' property and avoid using their position as the property's temporary guardian to their own benefit. To this end, lawyers have long been required to place their clients' money in bank accounts separate from their own. As early as 1908, professional ethical guidelines required that "money of the client or collected for the client . . . should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him." Canons of Professional Ethics Canon 11 (1908) (amended 1933). Today, almost one hundred years later, lawyers in all fifty states are held to that same high standard of professional conduct. According to the Model Rules of Professional Conduct, "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in

connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person." Model Rules of Prof'l Conduct R. 1.15(a) (1999).

In compliance with these ethical obligations, before 1980, clients' funds were generally pooled in noninterest-bearing, federally insured checking accounts. *Phillips*, 524 U.S. at 160. Even though, at that time, federal law prohibited federally insured banks from paying interest on checking accounts, such accounts were used to ensure that the funds were available on demand. See 12 U.S.C. §§ 371a, 1464(b)(1)(B), 1828(g). The holding bank received a great windfall from these accounts. Not only did the holding banks use the funds as an interest-free loan, keeping all the derived income, but they also charged the account holder -- the lawyer -- a fee for services rendered. Only if a sum was very large or was to be held for a long period of time would it be placed in an interest-bearing savings account, because, at that point, the loss of the checking account convenience was outweighed by the value of the interest gained. *See Phillips*, 524 U.S. at 160-61; *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 348 (1982). When such an account was set up, the client bore the additional costs for any services rendered by the bank and the lawyer in accounting for the interest, remitting it to the client, and generating tax forms for both the client and the Internal Revenue Service.

Client trust accounts, however, would not remain interest-free for long. In 1980, Congress passed the Consumer Checking Account Equity Act, codified at 12 U.S.C. § 1832, which allowed federally insured banks to pay interest on certain demand accounts, called "Negotiable Order of Withdrawal" ("NOW") accounts. NOW accounts are strictly regulated; they must "consist solely of funds in

which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit." *Phillips*, 524 U.S. at 161 (quoting 12 U.S.C. § 1832(a)(2)). Although for-profit organizations, such as corporations, partnerships, associations, and insurance companies, are precluded from establishing NOW accounts for their own benefit, the Federal Reserve Board has determined that they may do so if the funds "are held in trust pursuant to a program under which charitable organizations have 'the exclusive right to the interest.'" *Id.* at 161 (citation omitted).

Congress could not have better timed its authorization of interest-bearing NOW accounts. Not only had interest rates reached unprecedented levels in the 1970s, but the States were in need of a new source of legal aid funding. An ethical tradition of the legal profession is the provision of legal services to those who cannot afford to pay for them. *See* Model Rules of Prof'l Conduct R. 6.1 (Legal Background); Geoffrey C. Hazard, Jr., *After Professional Virtue*, 6 Sup. Ct. Rev. 213, 215 (1989) ("[A] lawyer's obligation to represent the poor . . . is a classic canon of the legal profession."). Providing legal services to the poor is a complex undertaking, but at a minimum, all attorneys bear the ethical responsibility at some point in their career to represent indigent clients or in some manner work to make the legal system accessible to those who could not otherwise afford it. To that end, bar associations recommend that their members designate a certain number of hours each year to *pro bono* services. *See* Model Rules of Professional Conduct Rule 6.1 (recommending at least fifty hours of pro bono work a year). They also help secure funding to support individuals and organizations that provide indigent legal services. From 1974 to 1981, a large percentage of

this funding came from the Legal Services Corporation, a federally funded corporation, which awarded direct grants to local attorneys providing legal services to the poor. *See* James D. Anderson, *The Future of IOLTA: Solutions to Fifth Amendment Takings Challenges Against IOLTA Programs*, 1999 U. Ill. L. Rev. 717, 720. In 1981, however, Congress severely limited the scope and budget of the Legal Services Corporation, and as a result, the States and their bar associations were forced to look for new sources of funding.

The availability of interest through the establishment of NOW accounts provided a unique opportunity for the legal profession to further two of its most important ethical obligations -- ensuring that all individuals, regardless of their financial circumstances, have access to the judicial system and segregating client trust funds from the lawyers' own accounts -- without imposing additional societal costs. By pooling client deposits that individually were so small or held for such a short period of time that they would not earn a net positive interest, the States could use the interest earned on the combined deposits -- otherwise enjoyed as a windfall by the banks -- to fund indigent legal services at no cost to the owner of the principal. Thus, in 1981, Florida created the first IOLTA program. Today, every state in the nation has followed suit. *See Phillips*, 524 U.S. at 159 n. 1; *see also* Ind. Prof. Conduct R. 1.15(d) (2000) (Indiana, the last state to do so, instituted an IOLTA program after *Phillips* was decided.). IOLTA programs have been a brilliant success: in 1999, they generated $139 million nationwide. *See* Caitlin Liu, *Court Ruling Threatens A Major Funding Source for Legal Aid*, L.A. Times, Jan. 22, 2001 at B3.

The Washington State Supreme Court created its IOLTA program in 1984, codifying it in the Washington Rules of Professional Conduct as Rule 1.14. This rule requires lawyers to place "client funds that are nominal in

amount or expected to be held for a short period of time" in either (i) a pooled interest-bearing trust account, the interest from which is paid to the Washington Legal Foundation, (ii) a separate interest-bearing trust account for a particular client, or (iii) a "pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client." Wash. Rules of Prof'l Conduct R. 1.14(c)(2). When deciding the type of account to establish, lawyers need not inform their clients or obtain their clients' consent. Instead, lawyers are instructed to consider "only whether the funds to be invested could be utilized to provide a positive net return to the client," taking into account "(i) the amount of interest that the funds would earn during the period they are expected to be deposited; (ii) the cost of establishing and administering the account, including the cost of the lawyer's service and the cost of preparing any tax reports required for interest accruing to a client's benefit; and (iii) the capability of financial institutions to calculate and pay interest to individual clients." Wash. Rules of Prof'l Conduct R. 1.14(c)(3).

As the IOLTA program was being created, the Washington Supreme Court also ordered the incorporation of the Legal Foundation of Washington, a nonprofit charitable organization dedicated to improving the availability and quality of legal representation for the poor. The Legal Foundation of Washington itself does not litigate or educate but accomplishes its mission by distributing funding to different non-profit and educational associations through a grant application process. In 1990, the IOLTA program provided $3.9 million to the Legal Foundation of Washington, and in 1995, it provided $2.7 million.

This appeal challenges one specific aspect of Washington States's IOLTA program: its application to individuals who, during real estate transactions, place money

in the hands of an escrow or title company that employs at least one Limited Practice Officer ("LPO"), a state-licensed nonlawyer who is permitted by the state to "select, prepare, and complete the appropriate legal documents incident to the closing of real estate and personal property transactions . . . ." Wash. Admission to Practice R. 12. The position of "LPO" was created in 1983 in response to a Washington Supreme Court decision holding that laypersons performing those tasks were engaged in the unauthorized practice of law. *See Bennion, Van Camp, Hagan & Ruhl v. Kassler Escrow, Inc.* 635 P.2d 730 (Wash. 1981). Although IOLTA has applied to lawyers since its inception, it did not apply to LPOs until 1995 when the addition of subsection "h" to Admission to Practice Rule 12 and the enactment of Admission to Practice Rule 12.1 (collectively the "IOLTA rules") imposed on LPOs the same requirements that apply to practicing lawyers. Under Rule 12.1, client funds must be placed in an IOLTA account unless (i) the parties to a real estate transaction enter a written agreement requesting an interest-bearing account and "specifying the manner of distribution of accumulated interest to the parties to the transaction;" (ii) the funds are deposited in "a separate interest-bearing trust account for a particular party to a real or personal property closing on which accumulated interest will be paid to that party;" or (iii) the funds are deposited in "a pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each party's funds and the payment thereof to the respective party." Wash. Admission to Practice R. 12.1(c)(2).

Although escrow and title companies, like attorneys, use separate client trust funds to hold their clients' deposits, for the purpose of this decision, the similarity stops there. Unlike attorneys, escrow and title companies have never taken advantage of the interest-bearing capabilities of NOW accounts, even though they both used non-interest bearing

checking accounts before NOW accounts were established. Escrow and title companies have not deemed NOW accounts to be realistic options for their client trust funds due to the difficulty and expense attendant to the crediting of the proper amount of interest to each person whose funds have passed through the escrow account. Furthermore, these companies handle transactions on behalf of for-profit corporations for which client funds cannot be legally deposited in NOW accounts. Thus, even if the IOLTA rules did not exist and the principal would generate net interest, escrow and title companies would not establish interest-bearing NOW accounts.

Before the enactment of the IOLTA rules, escrow and title company client trust funds did not earn interest. They did, however, receive benefits from the holding banks in the form of "earnings credits." The credits, which accrued to the company itself, were used to offset bank fees for a variety of services, including accounting services and wire transfers. With the enactment of Rule 12.1, however, many banks -- but not all -- have stopped offering earnings credits to escrow and title companies opening IOLTA accounts. To make up for the loss of earnings credits and the corresponding rise in bank fees, some escrow companies -- but not all -- now charge "IOLTA" fees. As an example of these charges, Appellants provide a sample "settlement statement," which includes an "IOLTA/Accounting fee" of $5.39 charged to both the buyer and the seller.

II. Procedural History

In reaction to the proliferation of IOLTA programs, the Washington Legal Foundation sought individuals who were affected by these programs and, joining them as co-plaintiffs, initiated a number of lawsuits raising a constitutional takings challenge to their validity. It is a

matter of public record that to date, the Washington Legal Foundation has filed suit challenging state IOLTA programs in California, Massachusetts, Texas, and Washington. The first of these cases to reach the Supreme Court was *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). *Phillips*, however, arrived in a procedurally awkward manner as the Fifth Circuit Court of Appeals had addressed only the question of whether there existed a property right in the interest accruing to client funds deposited in IOLTA accounts. *Wash. Legal Found. v. Texas Equal Access to Justice Found.*, 94 F.3d 996, 1004 (5th Cir. 1996). The Supreme Court similarly limited its review, granting certiorari to determine whether "interest earned on client trust funds held by lawyers in IOLTA accounts [is] a property interest of the client or lawyer . . . ." *Phillips v. Wash. Legal Found.*, 521 U.S. 1117 (1997) (granting *certiorari*). Thus, the Supreme Court considered only that question. It held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." *Phillips*, 524 U.S. at 172 ("We express no view as to whether these funds have been 'taken' by the State; nor do we express an opinion as to the amount of 'just compensation.'"). The Court left open the question of whether a taking occurred without just compensation by virtue of the IOLTA program. This "bifurcation" of the Fifth Amendment question was presciently criticized by the dissenting Justices as "skewing the resolution of the taking and compensation issues that will follow." *Id.* at 178 (Souter, J., dissenting).

While *Phillips* progressed through the hierarchy of the federal courts, the Washington Legal Foundation's remaining IOLTA challenges were also making their way through the federal system. In the case before us, the Foundation joined with four individuals -- two LPOs and two LPO clients -- to challenge Washington State's IOLTA program, naming the

Legal Foundation of Washington, its president, and the Justices of the Washington Supreme Court (collectively "Appellees") as defendants. Appellants alleged that Washington's IOLTA program violated their First and Fifth Amendment rights. They sought (i) a judgment requiring the Legal Foundation of Washington "to refund the full amount of interest earned on Plaintiffs Brown's and Hayes's money placed into IOLTA accounts, plus interest;" (ii) a declaratory judgment that Admission to Practice Rules 12(h) and 12.1 are unconstitutional under the First and Fifth Amendments, "insofar as they require LPOs to place certain client funds into IOLTA trust accounts;" (iii) a permanent injunction preventing the Justices of the Washington Supreme Court "from taking any disciplinary action against LPOs who fail to comply with the requirements of . . . Rules 12(h) and 12.1, and from adopting any rules that purport to require LPOs, as a condition for practicing their profession in Washington, to handle client trust funds in a manner designed to ensure that interest on those funds will accrue to anyone not designated by the client;" and (iv) an award of costs and attorney's fees.

The district court, without the benefit of the *Phillips* decision, granted summary judgment to the Legal Foundation of Washington and the Justices on the ground that Appellants did not have a property right to the interest generated on funds held in IOLTA accounts. Without a property right, the district court reasoned, there could be neither a Fifth nor a First Amendment violation. While the case made its way on appeal to us, however, the Supreme Court held in *Phillips* that those individuals, like Appellants Brown and Hayes, who owned the principal placed in IOLTA accounts also owned the interest. A panel of this court was then faced with the task of advancing to the next stage of the Takings Clause analysis: determining whether there was a taking without just compensation. Following the

Supreme Court's lead in dividing the takings analysis into discrete pieces, the now withdrawn panel decision "trifurcated" the takings question into two further issues: whether there was a taking and what compensation was due. Viewing the interest earned on IOLTA funds as an independent entity, separate and distinct from the principal that gave it life, the panel concluded that the IOLTA program resulted in an appropriation of 100% of Appellants' property. *Wash. Legal Found. v. Legal Found. of Wash.*, 236 F.3d 1097, 1100-01 (9th Cir. 2001), *withdrawn*, 248 F.3d 1201 (2001). Overlooking the Supreme Court's traditional view that due to its fungible nature, money -- as opposed to real or personal property -- cannot be physically appropriated, *see United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989), the panel applied the *per se* takings test announced in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding that a permanent physical occupation of a portion of a roof was a "taking" regardless of the size of the occupation or the economic impact on the owner because it was a physical appropriation). The panel reversed the district court, holding not only that Appellants owned the IOLTA interest under *Phillips*, but also that the IOLTA program effected a *per se* taking that required remand to the district court to determine what "just compensation" was due. *Wash. Legal Found. v. Legal Found. of Wash.*, 236 F.3d at 1097. A majority of the active judges of this court voted in favor of rehearing en banc. We consider the issue anew.

III. Standing

Resolving a Fifth Amendment takings claim requires a fact specific inquiry into what has been taken and what compensation is due. Preliminarily, then, we must determine what property each Appellant has at stake in these proceed-

ings. Because a property right is a prerequisite for advancing to the second stage of the Takings Clause analysis, we cannot allow all five Appellants to proceed simply because one or two have a valid claim to the interest at issue. Mindful that this is not a class action, we must carefully scrutinize each Appellant's interest in and connection to Washington State's IOLTA program. Upon doing so, we find that two of the four individual plaintiffs lack standing to pursue this action. We conclude that only Appellants Brown and Hayes own funds that contribute to the principal placed in an IOLTA account, and that therefore, only they have a property right to the generated interest. Thus, the district court properly dismissed Daug's and Maxwell's claims (albeit, on other grounds). We also hold that the Washington Legal Foundation lacks representational standing to pursue this action.

A. Individual Standing

"Before reaching a decision on the merits, we [are required to] address the standing issue to determine if we have jurisdiction." *Nat'l Wildlife Fed'n v. Adams*, 629 F.2d 587, 593 n. 11 (9th Cir. 1980). "The standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify the exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). There are three requirements for standing: (1) "a plaintiff must have suffered an 'injury in fact' -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical;'" (2) "there must be a causal connection between the injury and the conduct complained of -- the injury has to be 'fairly . . . traceable to

the challenged action of the defendant, and not . . . the result of the independent action of some third party not before the court;'" and (3) "it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted) (alterations in original). We examine the property interest alleged by each of the individual Appellants in turn.

1. Appellant Brown

Appellant Allen Brown regularly purchases and sells real estate in the State of Washington. He knows of one transaction in which his escrow money was placed in an IOLTA account maintained at the Skagit State Bank. According to Brown, the $90,521.29 that he deposited with Land Title Company was placed in an IOLTA account for two days in April of 1997. He "objects to anyone other than me taking the interest earned on my funds." He also "objects to some of the activities engaged in by LFW and by those to whom LFW distributes IOLTA funds." Because Brown owned the principal that was placed in an IOLTA account, we conclude that the "interest income" earned on that principal is his property and therefore he has standing to challenge the IOLTA program. *See Phillips*, 524 U.S. at 172.

2. Appellant Hayes

Appellant Greg Hayes has purchased real estate in the State of Washington as part of his business dealings and expects to continue to do so. He and his business partner gave $1000 earnest money to Fidelity National Title Company on August 14, 1996, and the remainder of the property's cost, $6,396.66, on August 28, 1996. Fidelity

deposited both sums in an IOLTA account. The real estate transaction closed on August 30, 1996. Hayes was not informed that his escrow funds were being placed in an IOLTA account, and he did not learn of the existence of IOLTA until after that transaction was completed. Like Brown, Hayes "objects to anyone other than me taking the interest earned on my funds" and "to some of the activities engaged in by LFW and by those to whom LFW distributes IOLTA funds." Also like Brown, Hayes owned the principal that was placed in an IOLTA account. Thus, we conclude that the "interest income" earned on that principal is his property. Hayes therefore has standing to pursue this action. *See Phillips*, 524 U.S. at 172.

3. Appellant Daugs

Appellant Dennis Daugs is vice-president of SeaTac Escrow, Inc. ("SeaTac"), which provides escrow services to buyers and sellers in connection with real estate transactions. Daugs is also a licensed LPO, but he refuses to comply with Rule 12.1 because he "ha[s] determined that doing so would violate SeaTac's Fifth Amendment rights (as the holder of legal title to funds in the escrow account) and those of [his] customers (who hold equitable title to the funds)." Under Washington law, however, "legal title" does not include any valuable beneficial interests. *See, e.g., Lee v. Wrixon*, 79 P. 489, 490 (Wash. 1905) ("The bare legal title, . . . uncoupled with a beneficial interest, is not subject to execution."). Thus, assuming, without deciding, that Daugs holds "legal title" to the principal placed in the escrow account, that alone does not confer on him a right of ownership. Although Daugs may have legitimate objections to the IOLTA program and may believe his clients are better served by disregarding its dictates, he does not own the principal that is deposited in the IOLTA accounts, and therefore, he has

no claim to the generated interest. Without the requisite property right, Daugs lacks standing to challenge the IOLTA program on Fifth Amendment grounds. We thus affirm the district court's judgment as to Appellant Daugs.

4. Appellant Maxwell

Appellant Dian Maxwell is employed by Pacific Northwest Title Company of Washington ("PNW"), which provides escrow services among other things. After Rule 12.1 was established, PNW decided that to avoid the additional costs of the IOLTA program, estimated to be about $50.00 per transaction, it would not comply with Rule 12.1. Thus, PNW required its LPOs -- including Maxwell -- to surrender their licenses if they wished to continue employment. According to Maxwell, relinquishing her LPO license prevents her from fully practicing her profession because she can no longer "select and fill in the legal documents that [she is] fully qualified to select and fill in." Unlike Daugs, who asserts in his declaration that he -- as the owner of SeaTac -- held legal title to the principal placed in IOLTA accounts, Maxwell does not claim any ownership in the principal or the generated interest. At most, Maxwell appears to be arguing that she lost property in the form of her LPO license as a result of the IOLTA rules.

Although Maxwell may have been adversely affected by application of the IOLTA rules to LPOs, the loss of her LPO license was an indirect result of PNW's independent decision to eliminate LPOs from its payroll. Even if LPOs were exempt from the IOLTA rules, Maxwell can only speculate as to whether PNW would allow her to obtain a new LPO license while under its employment. Maxwell has failed to establish that her injury -- the loss of her LPO license -- would be redressed if LPOs were no longer required to place client funds in IOLTA accounts because such

a result would require PNW to make an independent, intervening decision to employ licensed LPOs. *See Pritikin v. Dept. of Energy*, 254 F.3d 791, 797 (9th Cir. 2001). Thus, not only was she properly denied relief by the district court on the ground that she had no property right to the generated interest, but because she has not shown that eliminating Rule 12.1 will redress her injury, she lacks standing to challenge the IOLTA program on Fifth Amendment grounds. *See Lujan*, 504 U.S. at 560-61 (1992).

B. Representational Standing

Washington Legal Foundation is a public-interest law and policy center with members nationwide. As evidence of its connection to the Washington IOLTA program, Washington Legal Foundation declares that its membership includes "citizens of Washington who object to having their money used to support the Washington IOLTA program, and LPOs in Washington who object to being forced to place client trust funds in IOLTA accounts." Of the four named Appellants, it appears that only Daugs and Hayes are themselves members.

The Supreme Court has established a three-prong test for determining whether an organization, such as the Washington Legal Foundation, can sue in its representative capacity. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998). "An association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. If "the association seeks a declaration, injunc-

tion, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind." *Id.* (quoting *Warth*, 422 U.S. at 515).

With respect to the alleged Fifth Amendment violation, Washington Legal Foundation encounters problems at the third prong of the representational standing inquiry. Because "the Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation," *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), prospective injunctive relief is an inappropriate remedy here, where the individuals are pursuing their remedy against the state, and the question is whether they are entitled to any remedy for the state regulatory action at issue. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."). While equitable relief may be available under other circumstances in a takings case, *see, e.g., Duke Power Co. v. Carolina Environmental Study Group. Inc.*, 438 U.S. 59, 71 n.15 (1978) ("[The Declaratory Judgment Act] allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained."); *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 613 (D.C. Cir. 1992) ("the district court should accept jurisdiction over takings claims for injunctive relief in the few cases where a Claims Court remedy is 'so inadequate that the plaintiff would not be justly compensated'") (citation

omitted), the remedy for the Fifth Amendment violation alleged here is to provide the property owner with just compensation, if a taking has occurred. Because the appropriate relief -- determining what, if any, just compensation is due to the owner of the property taken -- necessarily requires the participation of the individual members, Washington Legal Foundation does not have representational standing to pursue a Fifth Amendment taking claim.

Thus, we hold that only individual Appellants Brown and Hayes have standing. We affirm the district court's grant of summary judgment to the Legal Foundation of Washington and the Justices of the Washington Supreme Court on the Fifth Amendment claims of Daugs, Maxwell, and the Washington Legal Foundation. We leave open the question of standing as it pertains to the Appellants' First Amendment claims. We proceed with our Takings Clause analysis only as it relates to the property of Appellants Brown and Hayes.

IV. Ripeness

Also as a jurisdictional matter, we must determine whether the Fifth Amendment challenges of Brown and Hayes are ripe for review. The ripeness doctrine is derived from Article III's case or controversy requirement. It "prevents 'the courts . . . from entangling themselves in abstract disagreements over administrative policies, and also . . . protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by challenging parties.'" *Stuhlbarg Int'l Sales Co. v. John D. Brush and Co.*, 240 F.3d 832, 839 (9th Cir. 2001) (quoting *Lee Pharm. v. Kreps*, 577 F.2d 610, 618 (9th Cir. 1978)) (alterations in original). Although Appellees did not raise the question of ripeness at the district court, we may consider it for the first time on appeal. *See*

Reno v. Catholic Soc. Servs., 509 U.S. 43, 58 n.18 (1993) (concluding that because ripeness is derived in part from Article III principles, it may be raised for first time in the Supreme Court); *In re Cool Fuel Inc.*, 210 F.3d 999, 1006 (9th Cir. 2000) (holding that ripeness claims may be raised for the first time on appeal).

Appellees argue that the Fifth Amendment claims of Brown and Hayes are not ripe for review under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). We disagree.

In *Williamson*, petitioners claimed that the application of particular zoning regulations deprived them of their property without just compensation. Specifically, they alleged that the Williamson regional planning commission unreasonably disapproved of Hamilton Bank's preliminary development plans. *Williamson*, 473 U.S. at 175. Before the Court could reach the merits, however, it first had to determine whether the Commission had reached a final decision with respect to the development plans. If the Commission's decision was not final, it could not have "taken" the property, and the case would not be ripe for review. *Id.* at 186. The Court then established a two-prong test for determining whether the takings claim was ripe. First, "the government entity charged with implementing the regulations [must have] reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. Second, compensation must have been sought "through the procedures the State has provided for doing so." *Id.* at 194. Hamilton Bank had not sought building variances to allow development in accordance with its proposed plans, thereby failing to obtain the required final decision, *id.* at 190, nor had it sought compensation through the state's inverse condemnation proceedings, thereby precluding a determination that the State's compensation was

either just or not, *id.* at 194. The Court therefore concluded that the claim was not ripe.

There are, however, a few limited exceptions to the requirement of seeking compensation from the State before raising a takings claim. *Williamson* itself held that a plaintiff may be excused from this requirement if he demonstrates that "the inverse condemnation procedure is unavailable or inadequate." *Id.* at 197. In addition, "an exception exists where the state does not have a 'reasonable, certain, and adequate provision for obtaining compensation' at the time of the taking," *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101-02 (9th Cir. 1998); *see also Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993), or where resorting to state remedies would be futile, *see City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999).

With respect to the first requirement, the enactment of Rules 12(h) and 12.1 constitutes a final decision. With respect to the second, we believe that the futility exception applies. The final authority on a Washington State inverse condemnation proceeding is the Washington Supreme Court. The Justices of the Washington Supreme Court, as parties to the present action, have filed briefs that argue, not just that the claim is unripe, but that there was no Fifth Amendment violation. The Justices do not point to an available state remedy, nor do they suggest that one is needed. Thus, we conclude that requiring Brown and Hayes to seek compensation from the State -- a decision reviewable by the State Supreme Court -- would be futile, and hold that the Fifth Amendment challenges to the IOLTA program raised by Brown and Hayes are ripe for review.

V. The Fifth Amendment

The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the taking of "private property . . . for public use, without just compensation." U.S. Const. amend. V. For Brown and Hayes to succeed in their Fifth Amendment challenges, they must establish that the interest at issue was their private property and that it was taken without just compensation. *See Del Monte Dunes at Monterey v. City of Monterey*, 920 F.2d 1496, 1500 (9th Cir. 1990). An allegation that private property for which no compensation is due has been taken is insufficient to sustain a Fifth Amendment claim because it is the taking without just compensation that is constitutionally prohibited. *See Williamson Coun. Reg's Planning Comm'n*, 473 U.S. at 194 ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."); *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997) ("The Fifth Amendment is not offended by the government taking property, but only by the government taking property without just compensation.").

A. Private Property

Following the Supreme Court's decision in *Phillips*, there can be no doubt that the interest earned on IOLTA account deposits is the private property of the owners of the principal. Thus, under *Phillips*, Appellants Brown and Hayes have a property right to whatever interest their individual deposits generate.

Appellees nevertheless attempt to distinguish *Phillips*, urging us to hold that, because property rights are created by state law, *Phillips*, which assessed property rights under Texas law, does not control the decision under Washington State law. *See Phillips*, 524 U.S. at 164 (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)) ("The existence of a property interest is determined

by reference to 'existing rules or understandings that stem from an independent source such as state law.'"). This attempt is unavailing, however, because whatever distinction there may exist between Texas and Washington property law is not a tenable basis for avoiding the rule of *Phillips*.

In reaching its conclusion that "regardless of whether the owner of the principal has a constitutionally cognizable interest in the anticipated generation of interest by his funds, any interest that does accrue attaches as a property right incident to the ownership of the underlying principal," *id.* at 168 (emphasis in original), the *Phillips* majority relied upon "the rule that 'interest follows principal' [that] has been established under English common law since at least the mid-1700's." *Id.* at 165 (quoting *Beckford v. Tobin*, 27 Eng. Rep. 1049, 1051 (Ch. 1749) ("Interest shall follow the principal, as the shadow the body."")). Because Texas courts had long recognized the application of this common law rule, the Court rejected the argument that certain provisions of Texas law -- income-only trusts and marital community property rules -- demonstrated its disavowment. *Id.* at 167-68. Furthermore, allowing Texas to legislatively "sidestep the Takings Clause by disavowing traditional property interests long recognized under state law" would directly contradict the Court's holding in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), that "'a State, by *ipse dixit*, may not transform private property into public property without compensation' simply by legislatively abrogating the traditional rule that 'earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.'" *Phillips*, 524 U.S. at 167 (citation omitted).

We applied *Webb's* and *Phillips* in *Schneider v. California Department of Corrections*, 151 F.3d 1194 (9th Cir. 1998), which held, despite a state statute to the contrary, that prisoners possess a constitutionally cognizable

property right in the interest earned on the principal held in Inmate Trust Accounts. *Schneider*, 151 F.3d at 1201. Seeking to square *Webb's* and *Phillips*, which held that the common law rule that "interest follows principal" could not be abrogated by state statute, with *Roth*, which held that property interests were protected by the Constitution but created by state law, we distinguished between "new property" interests and "old property" interests. *Id.* at 1200-01. Although *Roth*, "a so-called 'new property' case," affirmed the "unremarkable proposition that state law may affirmatively create constitutionally protected 'new property' interests," it "in no way implied that a State may by statute or regulation roll back or eliminate traditional 'old property' rights." *Id.* at 1200 (emphasis in original).

> The States' power vis-a-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer "new property" status on interests located outside the core of constitutionally protected property, but they may not encroach upon traditional "old property" interests found within the core.

Id. at 1200-01 (emphasis in original). We defined the "core of constitutionally protected property . . . by reference to traditional 'background principles' of property law." *Id.* Because of the "common law pedigree and near-universal endorsement by American courts[,]" we concluded that the "interest follows principal" rule lay at the core of property law, and therefore could not be abridged by state statute. *Id.* at 1201 (citation omitted).

Although Appellees attempt to demonstrate that under Washington law, Brown and Hayes have no property right in the IOLTA interest, any distinctions that can be drawn between Washington law and Texas law (*Phillips*), Florida law (*Webb's*), or California law (*Schneider*) are immaterial.

This is particularly true given that Washington adopted the common law, as did most other states, by enacting a "reception statute" that provides that "the common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." Wash. Rev. Code § 4.04.010. Furthermore, Washington state courts have previously applied the common law "interest follows principal" rule. In *Tacoma School District. v. Hedges*, 42 P. 522, 522 (Wash. 1895), the Washington Supreme Court held that "in the absence of any statute upon the subject," the interest and penalties collected upon delinquent taxes should go to the school districts entitled to the principal rather than a general county fund. In 1988, nearly a century later, a Washington appellate court, "looking to the common law" and relying on the "principle that interest on public funds follows the ownership of those funds," held that "penalty and interest would follow the taxes upon which they were assessed." *City of Seattle v. King County*, 762 P.2d 1152, 1155 (Wash. Ct. App. 1988).

Thus, Appellees' attempts to distinguish *Phillips* by pointing to differences between Washington and Texas property law fail. The interest earned on the principal owned by Brown and Hayes held in IOLTA accounts is their private property.

B. Unconstitutional Taking

The *Phillips* majority did not address the question of whether an unconstitutional taking of private property occurred:

> We express no view as to whether these funds have been "taken" by the State; nor do we express an

> opinion as to the amount of "just compensation," if any, due respondents. We leave these issues to be addressed on remand.

Phillips, 524 U.S. at 172 (emphasis added). Far from disregarding the *Phillips* majority, as our dissenting colleagues suggest, we follow its directive in answering these questions on a fully developed record.

1. Whether a Taking has Occurred

Because *Phillips* did not reach the issue of whether a taking occurs when a state program enables otherwise barren principal to earn a net positive interest for the benefit of the poor, we turn to other takings cases involving property of a similar nature for guidance. As a preliminary matter, we must define the exact nature of the property at issue. In determining the existence of the property right, the *Phillips* majority stated that the accrued interest "attaches as a property right incident to the ownership of the underlying principal." *Phillips*, 524 U.S. at 168. Thus, the Court acknowledged that without the principal, there would be no interest and no property right in that interest. Because the latter does not exist without the former, we believe that it is logically sound to analyze the two in combination for purposes of determining whether a taking of property occurred. In a similar analysis of interest accruing on deposited funds, the Court characterized the interest on principal as a "beneficial use of [the owner's] property" or "[a restriction of] the owner's full exploitation of the property," *Webb's*, 449 U.S. at 163, thus suggesting that it did not view the principal and the interest as separate and distinct property interests. Applying the same reasoning, the property that we examine is a combination of the principal, which Appellants argue they have a right to keep from

earning interest accruing to the State, and interest generated thereon, which Appellants argue has been taken from them.

a. *Per se* v. *Ad Hoc* Analysis

We have generally accepted two methods of analysis in takings cases: the *per se* analysis used in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982), and the ad hoc analysis used in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). The per se analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money. As the Supreme Court has observed, "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible." *Sperry Corp.*, 493 U.S. at 62 n.9. The Court reaffirmed this view in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 530 (1998), when it held that although Eastern was required to pay millions of dollars to its employee benefits funds, it "is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a *per se* taking." *Eastern Enters.*, 524 U.S. at 530. We have endorsed *Sperry*'s conclusion that money differs from physical property in respects significant to takings analysis. Applying *Sperry*'s rationale, we held that an "[o]rdinance [imposing a fee in connection with the issuance of permits for nonresidential development to finance low-income housing] does not, as appellants suggest, constitute a taking *per se*." *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991). Other circuits have similarly approved of this aspect of *Sperry*. *See Meridian Trust and Safe Deposit Co. v. FDIC*, 62 F.3d 449, 454 (2d Cir. 1995) (*ad hoc* analysis employed to determine whether an assessment

under the Federal Deposit Insurance Act's cross-guarantee provision that rendered Meridian Trust insolvent constituted a taking); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3d. Cir.), *cert. denied*, 528 U.S. 963 (1999) (*ad hoc* analysis employed to determine whether requiring plaintiffs to pay benefits under the Coal Industry Retiree Health Benefit Act constituted an unconstitutional taking where it would bankrupt the company because "the categorical approach [to Takings Clause claims] has only been used in real property cases" and states traditionally have a high degree of control over commercial dealings); *Branch v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (*ad hoc* analysis employed to determine whether an assessment under the Federal Deposit Insurance Act's cross-guarantee provision constituted a taking because "the challenged assessment did not constitute either an invasion or a restriction on the use of real property"); *Nixon v. United States*, 978 F.2d 1269, 1285 (D.C. Cir. 1992) (characterizing *Sperry* as "distinguishing between money, which is not subject to the *per se* doctrine because it is fungible, and 'real or personal property'" (citation omitted)).

When similarly faced with the question whether a policy that transferred the interest that accrued on interpleader funds deposited in Florida courts to the clerk of the court was an unconstitutional taking in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64 (1980), the Supreme Court used the *ad hoc* analysis of *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978), as opposed to *Loretto's per se* approach. Although in the past it had "been permissive in upholding governmental action that may deny the property owner of some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare," the Court concluded that Florida's policy had done more than "adjust []the benefits

and burdens of economic life to promote the common good." *Webb's Fabulous Pharm., Inc.*, 449 U.S. at 163 (citation and quotation marks omitted). The Court characterized the Florida policy of retaining the interest from interpleader accounts -- the interest at issue exceeded $90,000 -- as a "forced contribution to general governmental revenues" for which "no police power justification is offered." *Id.* The Court compared the county's appropriation of interest to that addressed in *United States v. Causby*, 328 U.S. 256, 262-63 n.7 (1946), in which the Government had appropriated the air space above claimant's land as part of the flight pattern for military aircraft, destroying its use as a chicken farm. The Supreme Court later categorized Causby as an *ad hoc* case, when it reviewed the factors that had a particular significance on the "essentially *ad hoc*, factual inquiries" in the Court's Takings Clause jurisprudence in *Penn Central*, 438 U.S. at 123-28.

Our conclusion that we should take guidance from the Court's analysis in *Webb's* is bolstered by the Supreme Court's reliance on the *Webb's* decision in *Phillips* when it determined that a property right existed in the first place. Both cases applied the same common law rule -- "any interest . . . follows the principal" -- in concluding that the interest at issue was the property of the owner of the principal. *Phillips*, 524 U.S. at 166.

Moreover, we are presented with the very circumstances for which the *Penn Central* analysis was intended. Here, the government's "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. In creating its IOLTA program, Washington State concluded that "'the health, safety, morals, or general welfare' would be promoted," *see Penn Central*, 438 U.S. at 125 (citation omitted), by using the interest generated on IOLTA funds to help fund legal services for

the poor. Although the IOLTA program, like most government regulations, "curtails some potential for the use or economic exploitation of private property[,] requiring compensation in all such circumstances would effectively compel the government to regulate by purchase." *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (emphasis in original) (applying *Penn Central's ad hoc* analysis to determine if regulations restricting one means of disposing of certain Indian artifacts was an unconstitutional taking). We do not believe that the Fifth Amendment demands such an extreme result. The Takings Clause was never intended to replace the role of the people in determining which social programs are appropriate, and "has not been understood to be a substantive or absolute limit on the government's power to act. That Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." *Eastern Enters.*, 524 U.S. at 545 (Kennedy, J., concurring in judgment and dissenting in part).

That the banking industry is the regulatory backdrop for our decision also counsels against the application of the *per se* analysis to the regulations of the use of money at issue. Such analysis has almost exclusively been employed in situations involving real property. In creating its IOLTA program, Washington has not encroached upon a domain devoid of governmental regulation. As the *Phillips* majority recognized, it is the Federal Government's own regulations that make the state IOLTA programs feasible. Specifically, "the Federal Government imposes tax reporting costs only on those who attempt to exercise control over the interest their funds generate, see Rev. Rul. 81-209, 1981-2 Cum. Bull. 16 [and] prohibits for-profit corporations from holding funds in NOW accounts if the interest is paid to the corporation, but permits corporate funds to be held in NOW accounts if the interest is paid to the [IOLTA fund], *see*

Federal Reserve's IOLTA letter." *Phillips*, 524 U.S. at 170-71. We agree with the reasoning of the Federal Circuit:

> Because of "the State's traditionally high degree of control of commercial dealings," *Lucas*, 112 S. Ct. at 2899, the principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability. Thus, even though taxes or special municipal assessments indisputably "take" money from individuals or businesses, assessments of that kind are not treated as *per se* takings under the Fifth Amendment.

Branch, 69 F.3d at 1576 (citations omitted). Given the highly-regulated nature of the banking industry, individuals should expect that their commercial transactions, including their bank deposits, will be regulated. In contrast, "property law has long protected an owner's expectations that he will be relatively undisturbed at least in the possession of his property." *Loretto*, 458 U.S. at 436. While requiring an apartment owner to allow the "direct physical attachment of plates, boxes, wires, bolts, and screws to the building" is directly contrary to the history and tradition of property law, regulating what a bank depositor may earn on a particular bank deposit is concordant with the history and tradition of banking practice. *Id.* at 420.

Although we note that the Fifth Circuit recently has decided in a two to one decision to adopt the *per se* method of analysis in similar (but not identical) circumstances, *see Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, No. 00-50139, 2001 WL 122105 (5th Cir. Oct. 15, 2001), given the monetary nature of the property in question, the public nature of the IOLTA program, and the highly-regulated nature of the banking industry, we believe that the better approach is that of *Penn Central*.

Through the IOLTA program, the State of Washington may properly adjust the rights of individuals for the benefit of the public as long as its actions are "reasonably necessary to the effectuation of a substantial public purpose," *Penn Central*, 438 U.S. at 127, a determination that can be made only by engaging in the fact-specific *ad hoc* analysis. Following the Supreme Court's lead in *Webb's*, and the dictates of well-established takings jurisprudence, we not only believe it is entirely appropriate to apply *Penn Central's ad hoc* takings analysis to the IOLTA program, but that such an analysis is compelled.

b. Application of Ad Hoc Analysis

In conducting the factual inquiry required by *Penn Central*'s *ad hoc* analysis, we may conclude a taking has occurred only if a particular regulation goes so far that it "forces 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d at 974 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Although the *ad hoc* analysis provides no "'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons," the Supreme Court has principally relied on three factors: (1) "the economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124; *Phillips*, 524 U.S. at 176 ("Attention should be paid to the nature of the government's action, its economic impact, and the degree of any interference with reasonable investment-backed expectations") (Souter, J., dissenting) (citation

omitted). Although we proceed to consider these factors in the context of the LPO-deposited funds here at issue, the *Penn Central* analysis -- as opposed to the *per se* analysis -- applies with the same force of logic to lawyer-deposited client funds.

(i) Economic Impact

Before Rule 12.1 was enacted, escrow and title companies deposited customer trust funds into non-interest bearing checking accounts despite Congress's authorization of interest-bearing NOW accounts in 1980. Even today, those escrow and title companies that do not employ LPOs generally do not use NOW accounts because of the expense and difficulty involved in crediting the proper amount of interest to each affected person and because many of these clients are for-profit organizations prohibited from using NOW accounts. Thus, because no interest would be earned on client funds deposited by escrow and title companies absent the IOLTA program, requiring those companies to place client trust funds in IOLTA accounts has no economic impact on the owners of the principal. Indeed, if there be any economic impact, it is a positive one. Before their enactment, client trust funds were not placed in interest-bearing trust accounts. Following their enactment, however, client trust funds must be placed in interest-bearing accounts if they are not placed in IOLTA accounts. Thus, the IOLTA program, at worst, maintains the status quo and, at best, provides clients with interest they otherwise would not have earned.

Furthermore, the IOLTA regulations themselves provide that only those funds that would not earn a net interest -- either on their own or when pooled with subaccounting -- are to be deposited in IOLTA accounts. If for some reason, funds are placed in an IOLTA account which, due to miscal-

culation on the part of the LPO or some unforeseen delay, could have earned a net positive interest, the "taking" of that generated interest would be the direct result of the LPO's violation of the Admission to Practice Rules. Because such a violation cannot be attributable to the State, it cannot implicate the Takings Clause. Although Appellant Hayes believes that his "choice to receive the interest from my withholdings" was taken and Appellant Brown objects to "having no control over where the interest" goes, absent the IOLTA program, neither would have earned a positive net interest to receive or control. Brown concedes this fact. In response to being asked whether he was arguing that without IOLTA he would have earned $4.96, the amount calculated as the interest earned on the deposit at issue, Brown acknowledged that "without IOLTA in place I may not have earned anything." Thus, because neither Brown nor Hayes would have earned net interest on their principal deposits, placing their funds in IOLTA accounts had no direct economic impact on them.

Nonetheless, Brown and Hayes maintain that they suffered a direct economic impact because, once escrow and title companies employing LPOs were required to place client funds in interest bearing IOLTA accounts, some banks decided to stop offering earnings credits due to the cost of simultaneously paying interest on IOLTA accounts and providing earnings credits. Brown and Hayes claim that, because some escrow and title companies charge IOLTA fees to make up for the lost earnings credits, the cost of their real estate transactions increased. This assertion does not affect our economic impact analysis, for two reasons. First, neither Brown nor Hayes has established either that they were charged an IOLTA fee or that the banks used by their escrow companies have stopped offering earnings credits. Second, the earnings credits were incentive

payments to the escrow companies, not their customers, and, as such, the indirect economic impact on the escrow company customers of the companies' loss of credits cannot be considered as part of a takings analysis.

To the contrary, Skagit Bank, the bank holding Brown's principal, is among those that continue to give earnings credits for IOLTA accounts. Brown, however, argues that "it's on a really reduced scale since IOLTA came into effect." Thus, Brown claims that although he would not receive a direct payment of interest without IOLTA, he lost the equivalent, which "would have been earned in the sense of earnings credits" and have kept his costs down. He, however, fails to establish how much the additional costs were or whether they even existed.

Hayes's principal was deposited in an IOLTA account, Fidelity National Title Company of Washington ("Fidelity"), held with Seafirst Bank. Although Seafirst stopped offering earnings credits on IOLTA accounts some time after Rule 12.1 was adopted, the record does not allow us to determine whether Fidelity passed the loss of earnings credits onto its customers by imposing an IOLTA fee. Hayes's escrow closing statement does not appear to include an IOLTA fee, and Hayes does not assert that such a fee was charged. As support for his claim, Hayes relies solely on his unsupported belief that "escrow companies in order to close the property . . . have to increase their fees and I have to pay them an increased fee to cover the cost of IOLTA."

The record also fails to establish whether, as a general matter, those escrow companies that deal with banks that have stopped giving earnings credits in fact charge an additional fee to cover the loss. It seems, for example, that Daugs's company does not impose additional costs to make up for the loss of earnings credits. On the other hand, Maxwell testified that Pacific Northwest Title Company charged a flat rate "trust accounting fee" after the enactment

of Rule 12.1 during the time that it still employed LPOs. Attached to the declaration of Gerald Wheeler, a C.P.A. who does computerized escrow accounting for banks, is an escrow settlement statement from an unrelated land transaction. Both the buyer and the seller were charged $5.40 as an "IOLTA/Accounting Fee "and a tax on the IOLTA/Accounting Fee. Yet Keith Leffler, an associate professor of Economics at the University of Washington, argues that IOLTA fees are really an example of sellers "testing whether they can profitably raise prices." According to Leffler, "it is very likely that the IOLTA program has had no effect on the prices paid by the users of escrow services." He believes that only an economic analysis could determine whether IOLTA has had an adverse impact on escrow fees, but no such analysis has been done. Furthermore, because those companies that impose IOLTA fees charge both the buyer and seller, Leffler argues that "the amount bears no relationship to any change in earnings credits from . . . earnest money deposits . . . . Even if one could show that as a result of [a loss of earning credits] there was an average increase in the prices paid by users of these services, there would be no reason to believe that the impact on any particular client would bear any relationship to any loss of earnings credit on the funds of that client, much less any relationship to the interest paid to the IOLTA program on that client's funds."

Moreover, as Professor Leffler's economic analysis demonstrates, even if there were an economic impact on escrow companies' customers such as Brown and Hayes, that impact would have been the result of discrete, discretionary pricing decisions by the affected escrow companies in response to the bank's decision to discontinue or decrease the availability of discounts on the companies' banking charges. While the dissent focuses on the fact that the payment of the earnings credits demonstrates that the

deposits had economic value to the bank, one hardly needs that evidence to understand that the entire basis for the profitability of the banking industry is the value to the bank of the temporary use of other people's money. Much more important for present purposes is the recognition that under the commercial arrangement between the escrow companies, the banks, and the escrow companies' customers as it existed before IOLTA, the value of that use was split between the banks and the escrow companies. The customers had no property interest in that value, and, although the escrow companies could choose to pass on the lower overhead resulting from their lower banking costs to their customers, that pricing decision did not create any property interest in the earnings credits. It is true, of course, that because of the IOLTA program the value to the bank of the temporary use of the escrow funds is less (although not zero -- banks do not distribute as interest the full value of deposited money, or they would have no earnings). But that does not change the fact that the earnings credits were nothing but incentive payments to repeat customers, the escrow companies, to use one bank rather than another, and were never the property of the escrow companies' customers.

Because the earnings credits did not belong to the customers in the first place, but rather were incentives provided to the escrow companies to use as they pleased for any covered banking charges, any impact on the customers is no different than many caused by economic regulation of someone else. Any price increase to customers due to increased banking costs would be just the indirect result of a decrease over time in the escrow companies' ability to acquire a certain kind of property for themselves. Moreover, any price increase would be the direct result of a private, discretionary pricing decision in no way mandated by the government. As such, those price increases should no more count as part of a takings analysis regarding the

customers' property than any other economic decision adverse to customers a retailer makes because of the economic impact on it of regulatory changes affecting one of its suppliers. Assume, for example, that changes in banking regulations meant that a supermarket would have to pay higher fees when depositing its daily sales receipts, and consequently the supermarket raised the price of milk. Neither past nor future purchasers of milk, we presume, could validly claim that the price increase was a taking of their property by the government.

Neither Brown nor Hayes can show that the cost of their individual real estate transactions increased as a result of the IOLTA rules. Therefore, we conclude that the alleged loss of the escrow and title companies' earnings credits had no economic impact on them.

(ii) Interference with Distinct Investment-Backed Expectations

"Governmental action through regulation of the use of private property does not cause a taking unless the interference is significant." *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d at 976 (citing *Andrus*, 444 U.S. at 66-67). Under Washington State's IOLTA rules, by definition, Appellants Hayes's and Brown's funds would not have been placed in an IOLTA account if they were capable of generating a net interest either on their own or in a "pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the respective party." Wash. Admission to Practice R. 12.1(c)(2). Brown recognized that fact when he testified that "without IOLTA in place I may not have earned anything." Furthermore, because escrow and land title companies, as a general practice, never placed client trust funds in interest-bearing

NOW accounts, neither Brown nor Hayes could have expected their funds to have earned interest while in the hands of their respective escrow and title companies.

Due to the structure of the IOLTA program and the general practices of escrow and title companies, neither Brown nor Hayes could have expected his principal to earn a net interest, and thus, the IOLTA program could not have interfered with their investment-backed expectations.

(iii) Character of Government Action

Brown and Hayes concede that they would have no interest without IOLTA, but they argue that, once interest is created, they have the right to determine what -- if anything -- is done with the interest. Viewing the accrued interest as its own entity, divorced from the principal, for the purpose of characterizing the extent of the "property" taken, Brown and Hayes assert that because the IOLTA rules dictate that all the interest earned on IOLTA accounts must go to the Legal Foundation of Washington, the IOLTA program is the equivalent of a 100 percent physical invasion of their property. We disagree.

The IOLTA rules are better viewed as a regulation of the uses of Brown's and Hayes's property, consisting of the principal and the accrued interest in aggregation. That said, the character of the government action is best viewed in the context of the industry it regulates. Banking is a heavily regulated industry, and the ability of particular types of deposits to earn interest has often been the subject of banking regulations. In fact, without the Federal Government's regulations regarding what types of accounts can earn interest, the IOLTA program may never have been born. Moreover, the ability to practice a profession -- and the conduct expected of those who do -- is also heavily regulated. Lawyers have always been held to the highest

legal and ethical standards. As part of their state bar membership, lawyers in Washington are encouraged to provide legal services "to persons of limited means or to public service or charitable groups." Wash. Rules of Prof'l Conduct R. 6.1. With or without IOLTA, they are required to segregate their clients' funds from their own to ensure that funds are not used improperly. Wash. Rules of Prof'l Conduct R. 1.14. When LPOs are admitted to perform a limited practice of law, they are held to the same legal and ethical standards as lawyers. Thus, they, too, are expected to safeguard their clients' property and to do their best to ensure that the legal system is available to all who need it. Viewed in this context, the IOLTA regulations are not out of character for either the commercial industry or the professions they affect.

The Takings Clause does not prevent the Government from being able to regulate how people use their property but limits that ability to what is "just and fair." *Andrus*, 444 U.S. at 66-67. Although "the government may impose regulations to adjust rights and economic interests among people for the public good," it may "not force 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d at 974 (citation omitted). Here, neither Brown nor Hayes is being singled out to bear a burden that should be borne by the public as a whole. They, as participants in our legal system, are required to place their money in IOLTA trust accounts that generate funds at no cost to them and that expand access to the legal system from which they benefit. Given the highly regulated nature of the banking and professional industries the IOLTA rules affect, this additional unobtrusive regulation does not exceed what is "just and fair" -- especially where Brown and Hayes would have earned no interest absent IOLTA. We therefore conclude that Washington

State's IOLTA program does not take either Brown's or Hayes's property.

2. Just Compensation

There is a second reason why Washington State's IOLTA program does not work a constitutional violation with regard to Brown's and Hayes's property: Even if their property was taken, the Fifth Amendment only protects against a taking without just compensation. Because of the way the IOLTA program operates, the compensation due Brown and Hayes for any taking of their property would be nil. There was therefore no constitutional violation when they were not compensated.

Determining what constitutes "just compensation" requires putting "the owner of the condemned property 'in as good a position pecuniarily as if the property had not been taken.'" *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)). Incidental losses that result from the takings are not compensable. *Winn v. United States*, 272 F.2d 282, 286 (9th Cir. 1959) (rejecting claim that compensation for the loss of business resulting from highway construction should be included in compensation accounting for value of the lost land itself). "The question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). Thus, we must determine what Brown and Hayes would have enjoyed in the absence of IOLTA.

Land Title Company deposited Brown's money -- $90,521.29 -- into an IOLTA account at Skagit State Bank where it remained for two days. The escrow IOLTA account was earning 1 percent per annuum. Hayes's $14,793.32 was deposited in Fidelity's IOLTA account; $2,000 remained in the IOLTA account for sixteen days and

$12,793.32 remained in the account for two days. It is unclear from the record what the interest rate was at Hayes's bank. As previously discussed, however, without IOLTA, neither Brown nor Hayes would have earned interest on his principal because by regulatory definition, their funds would have not otherwise been placed in an IOLTA account, and the general practice of escrow and title companies was -- and still is -- to place funds in noninterest-bearing accounts when IOLTA does not apply. Although without IOLTA, Brown and Hayes at most would have had the right to keep the principal from earning interest, the loss of that right has no economic value.

In seeking compensation for the interest their principal earned when deposited in the IOLTA account, Brown and Hayes are in actuality seeking compensation for the value added to their property by Washington's IOLTA program. In other words, Brown and Hayes are seeking compensation not for the value of what they lost, but for the value of what the Legal Foundation of Washington has created. Our Takings Clause jurisprudence has never "forced a State to confer, upon the owner of property that cannot produce anything of value for him, ownership of the fruits of that property should that property be rendered fertile through the government's lawful intervention." *Phillips*, 524 U.S. at 181 (Breyer J., dissenting).

In the context of real property, it is clear that the owner of condemned land need not be compensated for the value created by the government's exercise of the power of eminent domain. In *United States v. Virginia Electric and Power Co.*, 365 U.S. 624 (1961) ("*VEPCO*"), for example, the Court had to determine what compensation was due to the owner of a destroyed perpetual and exclusive flowage easement when the Government, exercising its dominant servitude, "reduced the value of riparian lands by denying the riparian owner access to the stream." *Id.* at 629.

Without the overriding dominant servitude, "the Government's destruction of that easement would ordinarily constitute a taking of property within the meaning of the Fifth Amendment." *VEPCO*, 365 U.S. at 627. Guided by the principle that the property interest owner "is entitled to be put in as good a position pecuniarily as if his property had not been taken" but not more, *id.* at 633 (citation omitted), the Court excluded from consideration any value derived from the land's riparian location and the water power development. *Id.* at 629. Because the Government's dominant servitude allowed it to reduce the value of the riparian lands by denying the riparian owner access to the water," it also permitted the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated." *Id.* Thus, excluding land's riparian-based value, the Court determined that just compensation for "the value of the easement is the nonriparian value of the servient land discounted by the improbability of the easement's exercise." *Id.* at 635.

It is also clear that a property owner need not be compensated for losing the ability to use his land when there is no "reasonable probability" that such a use will occur. *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 275 (1943). Thus, when the owner of a condemned parcel of land has been granted the power to take, by eminent domain, riparian lands and water rights to set up a system of hydro-electric power production but has not yet used it, the Government need not compensate him for the lost opportunity. *Id.* at 285. Although the value of the condemned property may "reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted," *id.* at 275, it need not reflect "the existence of [a] privilege to use the power of eminent domain" to create a profitable four-dam enterprise in the

distant future. *Id.* at 280. And although the owner of the property was losing a valuable opportunity, "he was not being deprived of values which result from his expenditures or activities." *Id.*

Furthermore, the Government need not compensate "for any part of what it has added to the land." *City of New York v. Sage*, 239 U.S. 57, 61 (1915). Thus, the owner of land condemned for a reservoir is not entitled to compensation for the value added to the land by the availability and adaptability of the reservoir; it need only compensate the owner of the land for what is fairly believed to be the fair market value of the land at the time of condemnation. *Sage*, 239 U.S. at 61. "The Government cannot . . . 'be made to pay for a loss of theoretical creation, suffered by no one in fact,' for there is 'no justice in (requiring the Government to pay) for a loss suffered by no one in fact.'" *VEPCO*, 365 U.S. at 642 (Whittaker, J. dissenting) (citations omitted).

Here, Brown and Hayes admit that, at most, IOLTA takes their right to let their principal lie fallow. In other words, they have lost the opportunity to place the principal in a noninterest-bearing checking account. Once Brown and Hayes gave dominion and control to their respective title and escrow companies, however, their 'right' to control how the principal was used had the same value to them as the barren flowage easement would have had in *VEPCO*, *i.e.*, no value at all. They have produced no evidence that, without IOLTA, they could have dictated how the escrow and title companies handled their principal. Nor have they been deprived of values resulting from their expenditures or activities because, within the restrictions of the IOLTA rules, no such values could exist. Furthermore, while Brown and Hayes have the right to control the accrued interest in theory, as a practical matter, that right will never come to fruition on its own because without IOLTA there is no interest. Thus, although Brown and Hayes may have, at most, lost one of the sticks in their bundle of property rights -- the right to let the principal lie fallow -- "there are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment." *United States ex rel Tenn. Valley Auth.*, 319 U.S. at 281. This is one of them.

We therefore hold that even if the IOLTA program constituted a taking of Brown's and Hayes's private property, there would be no Fifth Amendment violation because the value of their just compensation is nil.

VI. First Amendment

The district court did not address Appellants' First Amendment claims because it concluded that Appellants did not have a property right to the interest at issue. Because this conclusion was abrogated by *Phillips*, the district court must now consider what speech, if any, is at issue and whether the IOLTA program violates any rights Appellants may have emanating from the First Amendment. Therefore, we vacate this judgment and remand Appellants' First Amendment claims to the district court for further proceedings consistent with this opinion.

VII. Conclusion

For the foregoing reasons, the district court's grant of summary judgment with respect to Appellants' Fifth Amendment claims is affirmed, and its grant of summary judgment with respect to Appellants' First Amendment claims is vacated and remanded. Each party shall bear its own costs of appeal.

AFFIRMED in part, VACATED in part, and REMANDED.

KOZINSKI, Circuit Judge, with whom Judges Trott, Kleinfeld and Silverman join, dissenting.

For the second time within a year, our court follows the dissenters in a Supreme Court takings case while ignoring the Supreme Court majority. *See also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Rental Planning Auth.*, 228 F.3d 998 (9th Cir. 2000) (Kozinski, J., dissenting from denial of rehearing en banc). In so doing, our court once again deprecates one of the cherished protections of the Bill of Rights--the right not to have the government take private property without just compensation. It also creates a square conflict with the only other circuit to have ruled on this issue. *See Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, No. 00-50139, 2001 WL 1222105 (5th Cir. Oct. 15, 2001).

The majority starts--as it must--with the proposition that interest earned by appellants on funds deposited in IOLTA accounts is their property. The reason they must is that the Supreme Court said so. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998). The question presented, then, is whether the government must pay compensation when it takes this private property for a public purpose. The majority starts down the wrong track by asserting, as if it were an established fact, that there are some kinds of private property the government may take without paying compensation: "An allegation that private property for which no compensation is due has been taken is insufficient to sustain a Fifth Amendment claim because it is the taking without just compensation that is constitutionally prohibited." Maj. Op. at 15663 (emphasis added). But, before today, no case has ever held that there are some kinds of "private property for which no compensation is due." The cases the majority cites stand for a much different proposition: They hold that the Fifth Amendment does not prohibit the taking

of property, as it clearly does not; what it prohibits is the taking of property without compensation. This does not support the majority's claim that there are certain kinds of property the government may take without paying compensation.

The only case authority that arguably supports the majority's radical proposition is Justice Breyer's dissent in *Phillips*. The majority's theory, evidently built upon Justice Breyer's approach, seems to be that if the property owner would not have realized the value of the property but for the government's actions, then the government can take it and pay the owner nothing. Compare Maj. Op. at 15673-75 with *Phillips*, 524 U.S. at 182 (Breyer, J., dissenting). Although Justice Breyer was in distinguished company in *Phillips*, his opinion lacked one important ingredient: a fifth vote. By contrast, the majority in *Phillips* made it quite clear that economic value is not the only interest protected by the just compensation clause: "While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property." *Phillips*, 524 U.S. at 170. *Phillips* speaks directly to our case when it states: "The government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected." *Id.*

The majority also builds on *Phillips*'s other dissent, that of Justice Souter. From there, the majority derives the novel theory that a governmental appropriation of private property can be judged by the ad hoc analysis of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), rather than the categorical approach of *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982) and *United States v. Causby*, 328 U.S. 256 (1946). Compare Maj. Op. at 15667-68 with *Phillips*, 524 U.S. at

176 (Souter, J., dissenting). But, contrary to the majority's assertion, it is not true that a court is free to choose whether it prefers the ad hoc approach or the per se approach in taking cases. Rather, the two approaches reflect different solutions to different problems.

Penn Central's ad hoc approach deals with regulatory takings--a difficult and vexing corner of takings law. This involves the situation where the government does not take property outright but, rather, limits the owner's use of the property for a regulatory purpose. Normally, the consequences of regulation are not compensable, because we must each bear the burdens--just as we enjoy the benefits--of living in a regulated society. For example, when the city requires a setback for buildings on residential lots, this is not a compensable taking because the regulation serves aesthetic and community purposes, and each property owner gets a correlative benefit from the fact that other homeowners can't build within the setback portion of their own lots. However, when a regulation goes "too far" in limiting the owner's use of the property, compensation is due. *See Dolan v. City of Tigard*, 512 U.S. 687 (1994); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987). The way we determine whether a regulation goes "too far," and thus becomes a taking, is by applying the ad hoc weighing of *Penn Central*.

The ad hoc approach has never been applied to a case where the government actually takes and uses the property in question. Thus, to continue with the same example, it would be totally unthinkable--at least it was until today's opinion--that a court would apply an ad hoc analysis if the city were to seize 15 feet from every homeowner's setback for the purpose of widening the street. That would doubtless be treated as a compensable taking, even if the city could prove that the homeowners would derive great benefits from the widened street. Because the city has taken the 15

feet and used it for a public purpose, there is nothing to weigh and balance; the ad hoc approach is inapplicable.

The majority's blurring of the distinction between regulatory takings and physical takings is alarming. In a complex world, a property owner will always get *some* benefit, real or theoretical, from a taking of his property. Thus, even the family that gets booted from its home to make room for a freeway will get the benefit of a much faster commute from the park bench whence it must take up residence. Under an ad hoc approach, this would merely be an adjustment of the burdens of life in the big city. But the Supreme Court--in majority opinions--has held that the physical taking of *any* property by the government or its agents is a compensable taking, even if the property owner gets an offsetting--or even a net--benefit. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The majority in *Phillips*, in fact, relies on Loretto and not on *Penn Central*.

My colleagues try to avoid the clear teaching of *Phillips* by arguing that the per se approach of *Loretto* and similar cases applies primarily to takings of real property. Maj. Op. at 15667-68. Of course, this is not true; if the city wants to display your Renoir in its museum, it can't just take it and compensate you with the joy of viewing it during visiting hours. The majority seems to admit as much when it quickly adds "personal property" to the description of property covered by the per se approach. *Id. (quoting United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989)). However, the majority finds it "particularly inappropriate" to apply a per se analysis when the property in question is money. But money is property and the majority gives no logical explanation for treating it differently. The majority argues that money is different because it is fungible. *See* Maj. Op. at 15667-69. But this makes no sense at all. If the government comes into your house and takes that Renoir

off your wall, you will suffer a compensable loss. You suffer the same loss if the government comes into your house and seizes an equal value in cash--the two events are indistinguishable for purposes of takings analysis. It is true that you might rue the taking of the Renoir more--you may have grown attached to it, or it may have sentimental value because you inherited it from Aunt Bertha who made you promise to keep it in the family. No matter, the government is entitled to take it, so long as it pays you the market value; you are entitled to nothing on account of your wounded feelings. *See United States v. Miller*, 317 U.S. 369, 375 (1943).

For purposes of the takings clause, then, real and personal property are reduced to their cash equivalents. It thus strikes me as peculiar and quite dangerous to say that the government has greater latitude when it takes money than when it takes other kinds of property. This portion of the majority's opinion will doubtless be greeted with a rousing cheer by government officials who will eagerly look to bank accounts and other places where money is kept, with an eye to snatching a few dollars here and there, and justifying it with some sort of "ad hoc" analysis.

The majority's reliance on a stray footnote in *Sperry*--discussing a very different proposition--does not survive scrutiny. As the Supreme Court explained in *Phillips*, *Sperry* dealt with a fee charged by the government for a service it rendered. The Court recognized that, where the government is entitled to be reimbursed for expenses it has incurred on the property owner's behalf, the charge is not a taking. In that context, the discussion of fungibility makes sense: If the government may charge a fee, it makes no difference whether it takes the money directly from the owner's funds or, instead, requires the owner to pay it separately. *Sperry*, 493 U.S. at 62 n. 9. Nowhere--and certainly not in *Sperry*--does the Supreme Court suggest that

the government's obligation to pay compensation is eliminated because it takes money rather than real or personal property. Indeed, *Phillips* makes it very clear that *Sperry* does not apply to this situation, because this is not a case where the government is charging for a service it renders. *See Phillips*, 524 U.S. at 171. My colleagues again disregard the teachings of the *Phillips* majority.

It is no doubt true that the IOLTA program serves a salutary purpose, one worthy of our support. As a citizen and former member of the bar, I applaud the state's effort to provide legal services for the poor and disadvantaged. But there is absolutely no reason appellants should have to give up their property to cover the full cost of this shared social responsibility. If the state believes that this is a service it should provide, it must be willing to pay for it. There ain't no such thing as a free lunch.

* * *

The case should be analyzed and decided precisely as in Judge Kleinfeld's opinion for the three-judge panel. Because I believe Judge Kleinfeld there sets out the proper analysis, and does so elegantly and persuasively, I adopt it in full as part of my dissent. For ease of reference, I reproduce Judge Kleinfeld's opinion as an appendix hereto.

[Judge Kleinfeld's opinion is reprinted in Appendix B.]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98-35154

D.C. No. CV-97-00146-JCC

WASHINGTON LEGAL FOUNDATION; ALLEN D. BROWN; DENNIS H. DAUGS; GREG HAYES; L. DIAN MAXWELL,
Plaintiffs-Appellants,

v.

LEGAL FOUNDATION OF WASHINGTON; KEVIN F. KELLY; BARBARA DURHAM, Chief Justice; GERRY L. ALEXANDER, Justice; JAMES M. DOLLIVER, Justice; RICHARD P. GUY, Justice; CHARLES WAYNE JOHNSON, Justice; BARBARA A. MADSEN, Justice; CHARLES Z. SMITH, Justice; PHILIP A. TALMADGE, Justice,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge Presiding

Argued and Submitted
February 9, 2000 -- Seattle, Washington

Filed January 10, 2001

Before: Stephen S. Trott, Andrew J. Kleinfeld, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Kleinfeld.

KLEINFELD, Circuit Judge:

This case raises constitutional questions about Washington's program for applying interest on lawyers' (and others') trust accounts to various good works.

I. FACTS

Lawyers' ethical requirements have long required that "money of the client or collected for the client . . . should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."[1] The contemporary formulation is that a "lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person."[2]

In order to keep clients' money separated, a lawyer traditionally maintains a trust account separate from the law firm account, and keeps clients' money in the trust account. Clients advance money to lawyers for many reasons, such as for the closing of a business or real estate transaction, satisfaction of a claim, bail, and fees to be earned by the lawyer in the future but to be secured by the trust account deposit. Lawyers also receive money to be paid partly or entirely to their clients, perhaps after deduction of fees. Often insurance companies send settlement checks to plaintiffs' lawyers payable to the client "and" the lawyer. The lawyer has the

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[1] *Cannons of Professional Ethics* Canon 11 (1908) (amended 1933).

[2] *Model Rules of Professional Conduct* Rule 1.15(a) (1999).

client endorse the check for deposit in the trust account by the lawyer and subsequent disbursement after the check clears, to third parties with claims, to the lawyer for his fees, and to the client. Traditionally, a law firm maintained one trust account in a non-interest bearing checking account for all its clients. Occasionally a separate interest bearing trust account or other device was used for a single client's money when the amount is large enough or the duration long enough to be worth maintaining a separate account.

Earlier in the century, lawyers often used to keep clients' money in separate envelopes in office safes.[3] After World War II (perhaps partly because banks had become safer), lawyers started placing funds in bank accounts separate from their law firm accounts.[4] Neither device generated any interest for the client or the lawyer, and the lawyer had to pay fees to the bank to maintain the trust account. Though the lawyer held the client's money as a fiduciary,[5] failure to obtain interest for the client was generally not a breach of fiduciary duty because none was obtainable as a practical matter. Interest was not paid on money in checking accounts, but except where the size and duration of the deposit were both large, no one concerned themselves about it. For a client to obtain interest on an amount held in trust, the expected interest had to exceed the value of the lawyer's time needed to establish a separate account, or else seeking interest made no economic sense. For the occasional circumstance where it was worth the

[3] *See Clark v. State Bar*, 246 P.2d 1, 4 (Cal. 1952).

[4] *See id.* Some lawyers became troubled about amounts in trust accounts exceeding FDIC insurance limits during the 80s when many banks failed.

[5] *Model Rules of Professional Conduct* Rule 1.15 cmt. 1 (1999).

time, lawyers would establish a separate interest bearing trust account so that the client could get the interest.[6]

Two things precipitated a change from the tradition that no interest was obtained from lawyers' trust accounts. First, in the 1970's, interest rates reached unprecedented high levels. Suppose $30,000 from a routine personal injury settlement were left in a non-interest bearing trust account for two weeks, while the insurer's check cleared and court reporters' and other expenses were paid. When rates were only 3%, only $35 in interest was lost, an amount less than the lawyers' fees and bank charges that would be required to maintain a separate account to obtain the interest. But when money market funds were paying 19%, a client stood to lose $219 on the same deposit. The interest was just too much to ignore.

Previously, banks were receiving the benefit of the use of the money in lawyers' non-interest bearing trust accounts, effectively as free loans from lawyers' clients, because before 1980, federal law prohibited federally insured banks and savings and loans from paying interest on checking accounts.[7] The competitive pressure on banks from money market funds and others led to the second change, a new federal statute allowing payment of interest on some demand accounts.

The combination of statutory and regulatory changes allowing payment of interest on some demand bank accounts

[6] *See In re Massachusetts Bar Ass'n*, 478 N.E.2d 715, 716 (Mass. 1985) (reviewing history of IOLTA movement.

[7] *See* 12 U.S.C. § 371a.

and high interest rates led to programs in all the states[8] where lawyers' trust accounts generated interest applied by nonprofit foundations under bar or court supervision to charities, such as provision of free legal services for poor people. This case involves Washington's IOLTA ("interest on lawyers' trust accounts") program.

The Washington Supreme Court created an IOLTA program in 1984 and codified it in the Washington Rules of Professional Conduct.[9] Lawyers are required, on pain of professional discipline, to hold small and short term moneys in interest bearing trust accounts, with the interest going to the Legal Foundation of Washington.[10] The Legal Foundation is a charitable organization established by the Supreme Court of Washington. Clients' funds in lawyers' trust accounts generate interest that the banks pay to the Legal Foundation of Washington. Clients' knowledge or

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[8] *See Phillips v. Washington Legal Foundation*, 524 U.S. 156, 159 n.1 (1998). Since *Phillips* was decided, the last adopting state, Indiana, has instituted an IOLTA program. *See Indiana Professional Conduct* Rule 1.15(d) (2000).

[9] *Washington Rules of Professional Conduct* Rule 1.14 (2000).

[10] *See id.* The rules provide:

> A lawyer who receives client funds shall maintain a pooled interest-bearing trust account for deposit of client funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to The Legal Foundation of Washington, as established by the Supreme Court of Washington. All other fees and transaction costs shall be paid by the lawyer. A lawyer may, but shall not be required to, notify the client of the intended use of such funds.

consent is not required. Clients are only entitled to the interest on their money, under the Washington IOLTA rules, if the interest earned would be greater than the bank fees and fees for lawyers' and accountants' time to establish a separate interest bearing account for the client or maintain sub-accounts in a pooled trust fund. The money held in trust for a length of time too short or in amounts too small to generate interest exceeding these fees and bank charges generates interest for the Washington Legal Foundation.[11] This case has the unusual twist (factually unusual, but it makes no difference analytically) that the IOLTA rules apply to some people who are not lawyers, and the non-lawyers are the plaintiffs. Some duties traditionally performed by lawyers are also performed in some localities by non-lawyers, frequently raising questions among the state bars and supreme courts about whether those services constitute the unauthorized practice of law. The issue of non-lawyers preparing documents for real estate transactions has been resolved by the Washington Supreme Court. In its rules for the bar, the Court has provided for "limited practice of law" by "closing officers," who are not lawyers but may nonetheless prepare these documents.[12] Closing officers, like lawyers, take money into trust, typically as escrow agents taking into trust the seller's signed documents and the buyer's money and exchanging them. The Washington Supreme Court bar rules require that where a limited practice closing officer prepares the papers, the money must be placed into the same IOLTA accounts as lawyers' trust funds.[13]

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[11] *Washington Rules of Professional Conduct* 1.14(2) (2000).

[12] *Washington Admissions to Practice Rule* Rule 12 (2000).

[13] *Washington Admission to Practice Rules* Rule 12(b)-(c) (2000).

The title and escrow companies that employ closing officers do not have the same historical traditions as the bar. Traditionally, lawyers never received anything of value from the banks they used for trust accounts, and had to pay the bank fees for the trust accounts out of their law firm accounts, that is, the lawyers' own money. The escrow companies in Washington, like the lawyers, have in the past deposited money held in trust for customers in non-interest bearing trust accounts. Unlike the lawyers, the escrow companies have in the past received something of value in return from the banks. The banks did not pay them cash, but rather gave them credits applicable against bank fees. The credits were applied to such items as bank charges for money transfers, account reconciliations, and returned checks. Some escrow companies now charge their customers what they call "IOLTA fees" on the theory that IOLTA costs them money because they have lost these bank credits.

The small amounts of interest from each transaction in lawyers' and escrow companies' trust accounts add up to a lot of money, even though interest rates are not nearly as high as they were twenty years ago. In 1990 the program yielded $ 3.9 million for the Legal Foundation of Washington, in 1995, $ 2.7 million.

Appellants have varying concrete interests in the IOLTA program. Mr. Brown regularly buys and sells real estate in the course of his business, has engaged in at least one transaction where he knows interest on his $ 90,521.29 advance went to the Legal Foundation of Washington through the IOLTA program, and declares "I object to anyone other than me taking the interest earned on my funds." Mr. Hayes declares likewise, and also objects "to some of the activities engaged in" by the Legal Foundation and those to whom it distributes IOLTA money. Mr. Daugs owns an escrow company and is a limited practice officer.

According to his declaration, he has been violating the IOLTA rule so that his customers can have the benefit of earnings credits offsetting bank charges and because he objects to some activities of the Legal Foundation and its grantees. Ms. Maxwell is a former licensed limited practice officer employed by a title company that provides escrow services. Her company decided to fire all the limited practice officers to avoid the IOLTA rule and keep the bank credits, so she had to surrender her license and quit using some of her valuable skills in order to keep her job.

As an example of the activities some plaintiffs object to, they submitted a letter from the Legal Foundation to a legal services program saying "have I got a deal for you . . . . This means you can do work without regard to [Legal Services Corporation] restrictions for the first three quarters." The Legal Services Corporation, a federally funded national legal services program, provides funding for programs in the states, but legal restrictions prevent legal services staff attorneys from engaging in certain activities. The IOLTA money from Washington Legal Foundation is not encumbered by these restrictions. Thus the named plaintiffs object not only to losing the interest that IOLTA receives, and losing the free bank services they formerly received, but also to how the Legal Foundation uses the interest it obtains on their trust funds.

The named appellants and Washington Legal Foundation, a public interest advocacy group, sued the Legal Foundation of Washington and the Washington Supreme Court. They sought a declaratory judgment that the rules requiring limited practice officers to place clients' funds into IOLTA trust accounts, Washington Admission to Practice Rules 12(h) and 12.1, violated their First and Fifth Amendment rights. They also sought an injunction against disciplinary action for violating the rules and a refund of whatever interest IOLTA received from their deposits. On

cross motions for summary judgment, the defendants prevailed in district court.

II. ANALYSIS

Plaintiffs argue that the interest on their trust accounts belongs to the clients, and that the IOLTA program violates their Fifth Amendment right to the interest by taking it without just compensation. Plaintiffs further argue that the program violates their First Amendment right by forcing them to finance speech to which they object. We do not reach the First Amendment questions, because we conclude that plaintiffs are entitled to relief on their Fifth Amendment claim.

A. Ripeness.

Defendants argue that the Fifth Amendment claim is not ripe under *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*.[14] In *Williamson*, a landowner sued in federal court for just compensation, claiming that county land use regulations were so onerous as to amount to a taking.[15] The Court held that the claim was not ripe for federal adjudication, because the landowner had not yet obtained a final decision from the county nor had it used the available state procedure for obtaining just compensation.[16] Under *Williamson*, ripeness of a claim for compensation for a taking requires that (1) "the government entity charged

[14] *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

[15] *See id.* at 175.

[16] *See id.* at 186.

with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," and (2) the claimant has sought "compensation through the procedures the State has provided for doing so."[17] Defendants' theory is that plaintiffs have not met these requirements, and must sue for inverse condemnation in state court under Washington law before their Fifth Amendment claim can be ripe for federal adjudication. Defendants did not dispute ripeness in district court, but we consider it lest we overstep our jurisdiction.[18]

Unlike *Williamson*, there is no ongoing regulatory proceeding, so there is no occasion, as there was in *Williamson*, to await a final decision. There, the county zoning process was not yet complete. Here, what is at issue are general rules, Washington Rules of Professional Conduct Rule 1.14 and Washington Admission to Practice Rule 12, not an individualized regulatory proceeding. The process of promulgating the final rule has long since been concluded. Thus the "finality" requirement of *Williamson* does not preclude ripeness.

Most of what is at issue in this case is declaratory and injunctive relief, not the takings claim for $ 20 or so of lost interest. That $ 20 tail cannot wag the dog of this constitutional challenge to the IOLTA program into state court. *Williamson* generally keeps claims for just compensation in state court, but it does not exclude from federal

[17] *See id.* at 186, 194.

[18] *See Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989). We need not decide whether takings clause ripeness doctrine is, as plaintiffs contend and as applied to this case, merely prudential and not jurisdictional, *see Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733 (1997), because we reject defendants' ripeness argument.

court a claim for declaratory and injunctive relief to establish that a state law, on its face, violates the Fifth Amendment.[19]

Also, *Williamson* does not apply where "the inverse condemnation procedure is unavailable or inadequate."[20] Where resort to state remedies would be futile,[21] as when the state has no "adequate provision for obtaining compensation at the time of the taking,"[22] the second *Williamson* requirement does not apply. Futility is plain here. There cannot be a remedy under state law, because it is state law, and not merely an action by particular officials, that is being challenged. Were there any doubt about how the Supreme Court of Washington would respond were a challenge to be brought, the doubt is eliminated because the Court has already spoken in this case. The justices of that court are among the defendants, and they have filed a brief as appellees. The justices of the Supreme Court of Washington do not argue that the case is unripe, nor do they argue on any ground that they ought to have the opportunity to rule on this case before the federal courts do, nor do they suggest that any state remedy might be available. The justices argue that the IOLTA rule does not violate the Fifth Amendment. The IOLTA rule at issue, and the brief, filed in the justices'

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[19] *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 n.10 (1997); *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992).

[20] *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 197.

[21] *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

[22] *San Remo Hotel v. City and Council of San Francisco*, 145 F.3d 1095, 1101-02 (9th Cir. 1998).

capacity as such, leave no doubt that "the state has explicitly rejected its theory of the case."[23]

B. Property right.

Defendants argue that the clients whose money is deposited into an IOLTA account do not own a property right in the interest that money earns, so the Fifth Amendment protection of property does not pertain. The Fifth Amendment protects property rights but does not create them.[24] Under Washington law, they argue, the common law rule, "interest follows principal," does not necessarily apply, so the owner of principal in a trust account does not necessarily own the interest it generates. The Washington Supreme Court expressly considered and rejected objections to its IOLTA program on Fifth Amendment grounds, and stated in response to the objections that "interest on short-term or nominal client funds . . . does not constitute 'property' as defined by the United States or Washington Constitutions."[25]

One of the amicus briefs argues that "clients lose nothing because of IOLTA," because were it not for the pooling, the clients could get no interest, because the costs of administering the accounts to produce it would exceed the amounts produced. Indeed, the IOLTA rule is written so that if the interest would exceed the administrative costs of obtaining and crediting it, then the money should not be deposited into the IOLTA trust account.

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[23] *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 689 (9th Cir. 1993).

[24] *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

[25] *IOLTA Adoption Order*, 102 Wn. 2d 1101, 1109 (1984).

This is more a practical than a legal argument insofar as it addresses who owns the interest. The claim is not that the trust accounts do not produce interest, but only that the administrative expense of sharing it among the clients would exceed the amount earned. The money deposited into the trust account is the clients' money. If the clients own the interest, it might be worth it to them to pay the expense and collect it even if the lawyers or escrow companies did not think it worth the bother. One of the affidavits in this case establishes that a client might well say (and the affiant more or less does), "it is not so much that I want the $ 20, though I do, as that I don't want the Legal Foundation's donees to get it, because I don't like what they do with it." If lawyers and escrow companies had to pay trust account interest to clients, then software programs might be developed to make it easy to do it. If pooling works to generate interest for IOLTA, then it could presumably be made to work to generate interest for clients. Also, as the affidavits in this case demonstrate, the clients can and do suffer a detriment if the interest is given to the Legal Foundation, because the escrow companies impose charges on the clients to compensate themselves for the bank credits they formerly obtained. The property question is whether the clients own the interest, not whether the amounts are so small it is not worth the clients' while to collect it.

The circuits had been split on this question,[26] and were when the district court ruled. Subsequent to that ruling, the Supreme Court definitively answered the question, in

[26] *Compare Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir. 1987) *with Washington Legal Found. v. Texas Equal Access to Justice Found.*, 94 F.3d 996 (5th Cir. 1996).

Phillips v. Washington Legal Foundation:[27] the clients own the interest.

Phillips was a Fifth Amendment challenge to the Texas IOLTA program. It is materially similar to the Washington IOLTA program at issue here. Similar language was used in Texas to limit the pooled IOLTA trust funds to short term and nominal amounts that would not generate interest for clients exceeding the administrative costs of paying it to the clients. The question the Court considered was "whether interest earned on client funds held in IOLTA accounts is 'private property' of either the client or the attorney for purposes of the Takings Clause of the Fifth Amendment."[28] The Court answered by saying, "[we] hold that it is the property of the client."[29]

Defendants argue that *Phillips* should be distinguished because it depends on Texas law, and Washington law differs. The distinction is unpersuasive, for several reasons. Basically, *Phillips* is not based on some odd quirk of Texas law, but on a fundamental and pervasive common law principle accepted by both states. The central question in this case was open and subject to serious arguments on both sides before *Phillips*, but not after.

Phillips begins with the proposition that the principal in the trust accounts belongs to the client. Though one [of] the defendants' briefs argues otherwise, on the ground that a bank is merely a debtor of the depositor whose duties depend on contract, that proposition is irrelevant. The relationship at issue is not between the bank and the lawyer or

[27] *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998).

[28] *Id.* at 160.

[29] *Id.*

escrow company, but between either of them and the client. The Washington IOLTA rules, like the Texas rules, refer to the money at issue as "client funds," and "funds of clients" and "his or her funds," as distinguished from "funds belonging to the lawyer."[30] The only reason that the moneys at issue go into trust accounts instead of the firm accounts of the lawyers and escrow companies is that the money belongs to the clients, not the lawyers or escrow companies.[31]

Next, *Phillips* takes note of the well established rule that "interest follows principal" "as the shadow the body."[32]

> The rule that "interest follows principal" has been established under English common law since at least the mid-1700's. *Beckford v. Tobin*, 1 Ves.Sen. 308, 310, 27 Eng.Rep. 1049, 1051 (Ch. 1749) ("Interest shall follow the principal, as the shadow the body"). Not surprisingly, this rule has become firmly embedded in the common law of the various States.[33]

Phillips also responds to the practical argument discussed above, that the IOLTA program takes interest only from clients who would receive none, because the amounts are too small or deposited for too short a time to generate interest in excess of administrative expense to distribute it. The Court held that the interest is property protected under the Fifth Amendment even if "it lacks a positive economic

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[30] *Washington Rules of Professional Conduct* Rule 1.14 (2000).

[31] *Model Rules of Professional Conduct* Rule 1.15 (1999).

[32] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165 (1998).

[33] *Id.*

or market value."[34] "While the interest income . . . may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property."[35] This holding vindicates the plaintiffs' claim in the case at bar that they do not want interest on their money going to the application to which the Legal Foundation of Washington has elected to contribute it.

Phillips goes on to establish a striking proposition: states are not free to take away the client's property right to the interest by statutes depriving them of property rights in it.[36] This holding in *Phillips* speaks conclusively to defendants' argument that the clients in Washington do not own the interest because the Washington IOLTA rule so established as a matter of state law, and the Washington Supreme Court so stated in the dialogue about whether to adopt the IOLTA rule. The Supreme Court in *Phillips* noted that in a previous decision, *Webb's Fabulous Pharmacies, Inc. v. Beckwith,*[37] it held that a Florida statute governing interpleaders violated the takings clause. The statute at issue in *Webb's* provided that where a party deposits a sum with the clerk of the court the interest on that principal "shall be deemed income of" the clerk's office or the court. Were a state able, by court rule or statute, to establish ownership of interest in one other than the owner of the principal, this statute would have vitiated the Fifth Amendment. But

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[34] *Id.* at 169.

[35] *Id.* at 170.

[36] *See id.* at 171.

[37] *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

Webb's held that the statute, analogous to Washington's IOLTA rule, violated the Takings Clause.[38]

> "'[A] state by ipse dixit, may not transform private property into public property without compensation' simply by legislatively abrogating the traditional rule that 'earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.' In other words, at least as to confiscatory regulations as opposed to those regulating the use of property, a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."[39]

We applied *Phillips* in, *Schneider v. California Department of Corrections*.[40] There, prison inmates in California maintained small amounts of money in trust accounts, to purchase such personal convenience items as toothpaste at the prison canteens. A California statute provided that interest earned on inmates' money in the trust account would go to a state "inmate welfare fund" rather than to the individual inmate. Even though the state statute purported to eliminate any property interest the inmates might own to interest on their money, we held that under *Phillips*, "constitutionally

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[38] *See id.* at 164-65.

[39] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998).

[40] *Schneider v. California Dep't of Corrections*, 151 F.3d 1194 (9th Cir. 1998).

protected property rights can--and often do--exist *despite* statutes . . . that appear to deny their existence."[41]

We noted in *Schneider* that in *Phillips* and *Webb's*, the Supreme Court had held that "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law,"[42] and both cases relied on the common law rule that "interest follows principal" "in the face of a contrary state statute."[43] To explain how this could be, we explained in *Schneider* that "*Roth* stands not for a theory of plenary state control over the definition and recognition of compensable property interests,"[44] but rather that "there is, we think, a 'core' notion of constitutionally protected property," and a state's power to alter it by legislation "operates as a one-way ratchet of sorts," allowing the states to create new property rights but not to encroach on traditional property rights.[45] We recognized in *Schneider*, as the Supreme Court did in *Webb's* and *Phillips*, that "were the rule otherwise, States could unilaterally dictate the content of--indeed altogether opt out of--both the Takings Clause and the Due Process Clause simply by statutorily re

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[41] *Id.* at 1194.

[42] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998).

[43] *See id.; Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980).

[44] *Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1200 (9th Cir. 1998).

[45] *Id.*

characterizing traditional property-law concepts."[46] Thus, for example, a state could obtain vast moneys for good works until everyone with large sums of money moved it out of state, by passing a law stating that all amounts in excess of $100,000 on deposit in any financial institutions are the property of the state. *Schneider* holds that the "common law pedigree" since 1749 of the rule that interest follows principal, and its "near-universal endorsement by American courts," establishes that "interest income of the sort at issue here is sufficiently fundamental that States may not appropriate it without implicating the Takings Clause."[47]

Phillips' and *Schneider*'s rejection of positive state law as a means of avoiding the Takings Clause, disposes of the proposition that there is no taking because Washington, in its IOLTA program, has established as a matter of positive law that interest does not follow principal with respect to small and short term deposits in client's trust accounts. Texas, after all, had also established its IOLTA program as law, so if property rights in interest could be destroyed by state law in that manner, *Phillips* had to come out the other way. A state cannot avoid the Fifth Amendment limitation on takings of property by legislating away the property right.

All that is left as a possible distinction of this case from *Phillips* is that Washington, unlike most common law jurisdictions, has not accepted the common law rule that interest follows principal. Exceptions to the rule will not establish a contrary view, because there were exceptions in Texas. Despite those exceptions, *Phillips* held that the client's ownership of the principal in the trust account still gave the client a property right in the interest. Defendants have to

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[46] *Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1201 (9th Cir. 1998).

[47] *Id.*

establish that Washington is an anomaly among common law jurisdictions, not merely by having some exceptions, but by not having accepted the virtually universal rule.

Not surprisingly, the case for Washington's anomalous status cannot be made. Most American jurisdictions adopted the common law in what are called "reception" statutes. Washington has a quite ordinary reception statute: "The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state."[48] This ordinary reception of the common law was codified by the Territory of Washington in 1862, well before statehood, so no property owner in Washington has had to fear that by entering the state he or she was leaving behind the protection of the common law, including the rule that interest follows principal. In 1895, the Washington Supreme Court in *Tacoma School District v. Hedges*[49] applied the rule in holding that interest on delinquent taxes should go to the school districts entitled to the principal amount of the taxes, not to the general funds of the counties collecting the taxes. A century later, the court applied the rule similarly in *City of Seattle v. King County*[50] based on the "common law principle that interest on public funds follows ownership of those funds."[51] Defendants note some Washington statutory exceptions to the common law

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[48] Wash. Rev. Code § 4.04.010 (2000).

[49] *Tacoma School District v. Hedges*, 42 P. 522 (Wash. 1895).

[50] *City of Seattle v. King County*, 762 P.2d 1152, 1153 (Wash. Ct. App. 1988).

[51] *Id.* at 1155.

rule,[52] but they are of no more significance than the Texas exceptions that the Court in *Phillips* deemed insufficient to overcome the Fifth Amendment significance of the common law rule. Statutes in derogation of the common law in a few limited and specialized circumstances do not work a general abrogation of the common law outside their scope.[53]

C. Taking.

Phillips did not express a view on whether the Texas IOLTA law was a taking, nor on the amount of compensation due if it was,[54] because the circuit from which certiorari had been taken only addressed whether the interest was the client's property, and the petition for certiorari

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[52] *See* Wash. Rev. Code § 18.85.310(5) (real estate brokers must deposit nominal deposits in trust accounts, the interest to be used for low income housing and continuing education for real estate professionals); Wash. Rev. Code § 36.48.090 (interest on bail goes to county expenses, not those posting the bail); Wash. Rev. Code § 59.18.270 (landlords receive the interest on tenants' security deposits). These three statutes were adopted, respectively, in 1995, 1963, and 1973, long after the reception of the common law rule that interest follows principal. We have no occasion, of course, to consider the constitutionality of these provisions.

[53] Sutherland Stat. Const. § 61.01-61.06 (5th Ed.). The old maxim that statutes in derogation of the common law are strictly construed may be incorrect as prescription or description of how such statutes are actually construed. But as a description of how legislatures promulgate laws, it is correct to say that by legislating on one matter, they do not abrogate all common law inconsistent with the new statute on other matters that were not even before them at the time.

[54] *See Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998).

addressed only that question.[55] Defendants argue that even if interest on client trust funds is the property of the clients, the IOLTA rule works no taking. The district court did not reach the question of whether there was a taking for which compensation was due because *Phillips* had not yet been decided by the Supreme Court when it ruled. The district judge relied on the one circuit court case then on the books,[56] which has since been superseded by *Phillips*.

Plaintiffs presented evidence that for at least one of them, a measurable amount of money, about $ 20 in interest, was diverted to the Legal Foundation. *Phillips* holds that even where the client's interest on trust accounts "may have no economically realizable value to its owner, possession, control and disposition are nonetheless valuable rights that inhere in the property."[57] To apply that concretely, a real estate purchaser might want interest on his money to go to his or her preferred charity, perhaps a church, a school, Mothers Against Drunk Driving, or the local Rescue Mission, rather than the Legal Foundation's preferred charity, legal services for indigents, even if that interest could not be realized by the real estate purchaser. Plaintiffs submitted evidence that at least some of them do in fact object to their interest going to the Legal Foundation's grantees.

Defendants argue that there has been no taking because there has been no physical invasion of tangible property. They rely on the Supreme Court's statement in *Penn Central*

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[55] *See id.* at n.4.

[56] *See Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962 (1st Cir. 1993).

[57] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 170 (1998).

Transportation Co. v. New York City[58] that "[a] taking may more readily be found when the interference with property can be characterized as a physical invasion by the government."[59] But their argument uses the statement out of its context, which was regulation of real estate to preserve a historically and architecturally important building. The statement cannot be applied in the distinguishable context of money deposited in banks or invested in securities or money market funds. This would imply the nonsensical proposition that a taking would less readily be found if a state entirely confiscated people's money from their bank accounts or IRA's than if it installed a sign on their land.

Defendants seem to be arguing that the government can confiscate people's money without it being a taking compensable under the Fifth Amendment, based on cases where the government provided a service and charged a reasonable user fee for the service.[60] Taken out of the context of users' fees, the proposition is absurd. Unlike medieval England, most assets are now held in the form of fungible intangibles such as bank accounts, money market accounts, and securities. The Fifth Amendment protection of property would be eviscerated were we to construe confiscation of fungible intangibles as not amounting to a taking, as defendants urge. The Supreme Court drew precisely this distinction, between reasonable users' fees and the interest on IOLTA accounts, in *Phillips*, noting that it "would be a different case" if the state were "imposing reasonable fees it incurs in generating

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[58] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

[59] *Id.* at 124.

[60] *See e.g., United States v. Sperry Corp.*, 493 U.S. 52 (1989).

and allocating interest income."[61] *Phillips* holds that *United States v. Sperry Corp.*,[62] the user fee case, has no application to complete "confiscation of respondents' interest income" by an IOLTA program where the funds are managed by banks and private individuals.[63]

Defendants make another, more appealing, argument from *Penn Central* that the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."[64] The argument is that, because the plaintiffs could not have realized any money from the IOLTA funds, the economic impact is nonexistent, and because the IOLTA rule was in effect when they acted, the IOLTA rule could not have interfered with their expectations.

This argument fails on several independent grounds. First, the "economic impact" test is articulated in *Penn Central* in the context of regulation of the use of real estate, not deprivation in its entirety of any property. The point of the economic impact test in *Penn Central* is to distinguish government regulations of the owner's use of property permissible under its police power from those that go too far, requiring the government to compensate the owner for

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[61] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 171 (1998).

[62] *See also* our user's fee decision in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991).

[63] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 171 (1998).

[64] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

taking his property. That distinction is not necessary or appropriate where the government entirely appropriates a sum of money belonging to a private individual. The economic impact test would have relevance if the IOLTA rule merely regulated how the client used his interest, or where the interest was kept, or for how long. But that is not the case. The IOLTA rule entirely appropriates the interest on the client's principal in a trust account, so the distinction between regulation under the police power and a taking subject to Fifth Amendment protection is not affected by the economic impact.

This analysis is compelled by *Loretto v. Teleprompter Manhattan CATV Corp.*[65] There, a city required landlords to allow cable television companies to put cables on their roofs. The Court held that this permanent physical occupation of a portion of roof space was a "taking" "without regard to the public interests that it may serve,"[66] and without regard to the "minimal economic impact on the owner."[67] The Court held that the multi-factor test in Penn Central does not apply [*40] to a permanent physical occupation, as was the case for those parts of the roof on which the cables were mounted.[68] *Phillips* applied *Loretto*, in the context of IOLTA interest rather than physical inva-

[65] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[66] *Id.* at 426.

[67] *Id.* at 435.

[68] *See id.* at 432.

sion of real property.[69] And *Phillips* interpreted *Loretto* to mean that property was "taken" "even when infringement of that right arguably *increased* the market value of the property at issue."[70] Thus, says *Phillips*, drawing an analogy to IOLTA interest, "the government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected."[71] The Court in *Phillips* also expressly rejected the argument that because federal tax and banking regulations are what enables IOLTA to generate interest, there is no property right, on the ground that "the State does nothing to create value; the value is created by respondent's funds."[72] When the government permanently appropriates all of the interest on IOLTA trust funds, that is a *per se* taking, as when it permanently appropriates by physical invasion of real property.[73]

Second, it is not quite correct to say that IOLTA as structured does not deprive clients of any money. The rule says that in determining whether to deposit money held in trust into the IOLTA account or an account where the client will receive the interest, a lawyer must consider "only whether the funds to be invested could be utilized to provide a positive net return to the client," based on the interest to be earned while the funds "are expected to be" deposited,

[69] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 169-70 (1998) (emphasis in original).

[70] *Id.* at 170.

[71] *Id.* at 170.

[72] *Id.* at 171.

[73] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

and the various expenses including lawyers' fees for administering interest payable to the client.[74] This leaves two ways in which, as a practical matter, the client may lose an economically significant amount of interest. One, probably quite common, is where the funds "are expected to be" deposited for a much shorter period than they actually are. For example, disbursement to a client may be delayed because a physician who treated him in exchange for a pro tanto assignment of settlement proceeds calls to say that another bill is coming. A closing on a house may be delayed because the engineer whose report the bank needs catches the flu and finishes the report a couple of weeks late. All sorts of reasons intervene so that expected one day deposits, originally thought to produce interest less than the anticipated expense of paying it to the client, turn into deposits for a few weeks.

The second way a client may lose interest is that the costs of lawyers' and closing officers' services are overestimated. As a practical matter, the lawyers and closing officers have a substantial incentive not to be bothered with crediting clients with their interest. It is therefore in their interest to say of almost all routine trust deposits that no significant interest will accrue and to place the money into the IOLTA account. But a client, whether out of desire that he or she get every penny coming to them, a feeling of getting "nickeled and dimed," or an objection to contributing money to lawyers' and judges' favorite charity, may think it is worth having a lawyer spend $ 19.95 worth of time to get the client $ 20 in interest. Also, the amount of time and trouble involved in collecting, allocating, and distributing

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[74] *Washington Rules of Professional Conduct* Rule 1.14(3). The rule for closing officers, *Washington Admission to Practice Rules* Rule 12.1(b)(3), is analogous, except that "cost of closing officer's services" is substituted for "cost of lawyer's services."

interest to clients depends on how often it is done. If done once, it is probably a costly nuisance. If done frequently, it may become delegable to nonprofessional staff using off the shelf software.

D. Remedies.

Defendants argue that even if the interest is the client's property, and even if the IOLTA rule effects a taking, the Fifth Amendment nevertheless affords no remedy because the "just compensation" is zero. On this point, which the district court did not reach, a remand is necessary. The Fifth Amendment does not prohibit the taking of private property for public use; it allows it.[75] What it prohibits is the taking of private property for public use "without just compensation."[76]

Defendants argue that no equitable relief is available to enjoin a taking of private property for public use, citing *Ruckelshaus v Monsanto*.[77] *Monsanto* does not preclude all equitable relief related to a taking, but it does prevent a court in most circumstances from enjoining the taking itself. Even though the Washington IOLTA rule is a taking of private property for public use from clients of lawyers and closing officers, that does not necessarily entitle or require a district court to enjoin operation of the rule. The clients are entitled to just compensation, not to prevention of the taking, just as they would be if the state were taking their real estate to build a highway. Plaintiffs' prayer for relief seeks "reimbursement" of the interest taken from them.

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[75] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997).

[76] U.S. Const. amend. V.

[77] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

"Reimbursement" is not a correct form of relief, because plaintiffs never had possession of the interest that was taken from them, and, as explained below, reimbursement may be an incorrect measure of "just compensation."

Monsanto does not address all the equitable relief demanded, only the taking itself. Though they cannot enjoin the government from taking their interest for public use, plaintiffs are entitled to a declaratory judgment that taking their interest for public use without paying them just compensation, under the IOLTA rule, violates the Fifth Amendment. Plaintiffs also seek an injunction prohibiting the Washington Supreme Court from taking disciplinary action against limited practice officers (the closing officers escrow companies employ) for refusing to deposit clients' money into the IOLTA account, or from conditioning their licenses on complying with IOLTA rules. We do not decide whether such an injunction would be appropriate, because the district court has not yet considered the issue, but if it would otherwise be appropriate, *Monsanto* would not bar an injunction. *Monsanto* prevents courts from enjoining takings. This equitable relief would not enjoin takings, but would instead be addressed to saving the jobs of title and escrow company employees caught between the IOLTA rules and employers who do not want to employ anyone who will comply with the IOLTA rules.

Defendants correctly argue that the measure of just compensation is not the value that the government gains, but rather the value that the person whose property was taken loses.[78] Ordinarily if money is taken, it comes to the same thing, but not necessarily in this case. The evidence before

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[78] *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979); *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910).

us allows for differing conclusions, so there is a genuine issue of fact on this record. It is possible that the interest gained by the defendants exceeds the amount of the loss by the clients.

Plaintiffs' submissions include what the escrow companies call "IOLTA fees" charged to customers whose money is put into the IOLTA account. These fees and the affidavits explaining them support an inference that the clients are harmed financially by the IOLTA program, but the "IOLTA fees" do not measure the loss. The IOLTA fees are not charged by IOLTA, but by the title and escrow companies. Before IOLTA the banks previously received the benefit of the "float," that is, the interest-free loans lawyers gave them of their clients' money, and escrow companies of their customers' money, when it was held in trust accounts. A bank account is a loan of money by the depositor to the bank.[79] Before IOLTA, the banks "kicked back" part of this benefit of this interest-free loan to the title and escrow companies. The customers who put the funds in escrow, and had equitable title to them, received nothing. Now that IOLTA receives the benefit of the "float" instead of the banks, the banks no longer share it with the title and escrow companies, in the form of credits against bank charges. So the title and escrow companies charge customers an amount they refer to as "IOLTA fees," not based on any fees charged by IOLTA, but rather on their loss of benefits they previously shared with the banks from interest-free deposits of their customers' money. Because the interest is property taken from the customers, not the title and escrow companies, just compensation is due to the customers, not the title and escrow companies, and is measured by the loss to the customers, not the title and

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[79] *See IT Corp. v. General Am. Life Ins. Co.*, 107 F.3d 1415, 1422 (9th Cir. 1997).

escrow companies. The significance of the mislabeled "IOLTA fees" and loss of bank credits is that it shows some compensable value was there, even though the value was being retained by the title and escrow companies rather than the customers whose money they took in trust.

The Court in *Phillips* drew a distinction that implies the proper resolution of the just compensation measure (and with it, the constitutionally permissible form of an IOLTA program). Phillips says that the taking of interest on trust accounts "would be a different case" if the state were "imposing reasonable fees it incurs in generating and allocating interest income."[80] *Phillips* cites *Sperry*[81] in reference to this "different case" IOLTA plan. In *Sperry*, the government caused a fund to be generated for victims of Iranian revolutionary confiscations and charged a fee of 2% for expenses incurred in connection with the arbitration of claims and the maintenance of the fund.[82] By analogy with the Iranian confiscation fund, it may be the case that but for the efforts of the Washington Bar and Supreme Court, the banks and escrow companies would still get the benefit of the clients' and customers' money deposited into their trust accounts. For their service in "generating and allocating interest income," the Legal Foundation may be justified in "imposing reasonable fees" analogous to the fees the government charged on the Iranian confiscation fund. There have to be some expenses, for the clerical and administrative efforts in managing the flow and accounting for IOLTA funds. The IOLTA program managers have to pool the clients' moneys deposited into trust and make the arrangements with the banks, or there is no interest.

[80] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 171 (1998).

[81] *United States v. Sperry Corp.*, 493 U.S. 52 387 (1989).

[82] *See id.* at 57.

Just as a client is not entitled to the full amount that a lawyer collects for him, but only that amount less the lawyer's reasonable expenses and fees,[83] so just compensation for interest taken by IOLTA after IOLTA causes the interest fund to exist is something less than the amount of the interest. This analogy to the restitution theory applicable to lawyers' fees for producing a common fund is only partial. The principal, not the lawyers' efforts, produces the interest.[84] But there is some analogy to common fund cases, and to the Iranian confiscations fund in *Sperry*, because there would be no interest that could flow to the individual clients but for substantial administrative and clerical efforts to administer the IOLTA program, both to assure that lawyers' and escrow companies' trust funds went into the pooled accounts, and to distribute interest to clients out of pooled accounts.[85]

Even though when funds are deposited into IOLTA accounts, the lawyers expect them to earn less than it would cost to distribute the interest, that expectation can turn out to be incorrect, as discussed above. Several hypothetical cases illustrate the complexities of the remedies, which need further factual development on remand. Suppose $2,000 is deposited into a lawyer's trust account paying 5% and stays

[83] *See Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989).

[84] *See Phillips v. Washington Legal Foundation*, 524 U.S. 156, 168 (1998).

[85] An additional detail not clear from the record as it stands is whether the interest could flow to clients, or only to charities selected by clients, under the restrictions applicable to financial institutions in which trust funds could prudently be pooled.

there for two days. It earns about $.55, probably well under the cost of a stamp and envelope, along with clerical expenses, needed to send the $.55 to the client. In that case, the client's financial loss from the taking, if a reasonable charge is made for the administrative expense, is nothing. The fair market value of a right to receive $.55 by spending perhaps $ 5.00 to receive it would be nothing. On the other hand, suppose, hypothetically, that the amount deposited into the trust account is $ 30,000, and it stays there for 6 days. The client's loss here would be about $ 29.59 if he does not get the interest, which may well exceed the reasonable administrative expense of paying it to him out of a common fund. It is hard to see how just compensation could be zero in this hypothetical taking, even though it would be in the $2,000 for 2 days hypothetical taking. It may be that the difference between what a pooled fund earns, and what the individual clients and escrow companies lose, adds up to enough to sustain a valuable IOLTA program while not depriving any of the clients and customers of just compensation for the takings. This is a practical question entirely undeveloped on this record. We leave it for the parties to consider during the remedial phase of this litigation.

E. First Amendment Claim

Plaintiffs claim that the IOLTA program violates the First Amendment because it forces clients of lawyers and customers of escrow companies to contribute their interest money to groups such as legal services programs asserting public positions with which they disagree. Because plaintiffs prevail on their Fifth Amendment claim, and because the district court did not reach the First Amendment claim, we do not reach the First Amendment claim.

III CONCLUSION

IOLTA programs spread rapidly because they were an exceedingly intelligent idea. Money that lawyers deposited in bank trust accounts always produced earnings, but before IOLTA, the clients who owned the money did not receive any of the earnings that their money produced. IOLTA extracted the earnings from the banks and gave it to charities, largely to fund legal services for the poor. That is a very worthy purpose. But as *Phillips* reminds us, the interest belongs to the clients. It does not belong to the banks, or the lawyers, or the escrow companies, or the state of Washington. If the clients' money is to be taken by the State of Washington for the worthy public purpose of funding legal services for indigents or anything else, then the state of Washington has to pay just compensation for the taking. That serves the purpose of imposing the costs on society as a whole for worthwhile social programs, rather than on the individuals who have the misfortune to be standing where the cost first falls.[86]

In sum, we hold that the interest generated by IOLTA pooled trust accounts is property of the clients and customers whose money is deposited into trust, and that a government appropriation of that interest for public purposes is a taking entitling them to just compensation under the Fifth Amendment. But just compensation for the takings may be less than the amount of the interest taken, or nothing, depending on the circumstances, so determining the remedy requires a remand.

REVERSED and REMANDED.

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[86] *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON LEGAL, FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,	)	No. C97-0146C
	)	ORDER
Plaintiffs, v.	)	
LEGAL FOUNDATION OF WASHINGTON, KEVIN KELLY, BARBARA DURHAM, GERRY L. ALEXANDER, JAMES M. DOLLIVER, RICHARD P. GUY, CHARLES W. JOHNSON, BARBARA A. MADSEN, CHARLES Z. SMITH, and PHILIP A. TALMADGE,	)	
Defendants.	)	

This case questions whether Washington's promulgation of rules regulating Interest on Lawyer Trust Accounts (IOLTA) for Limited Practice Officers (LPOs) violates the U.S. Constitution. Plaintiffs are the Washington Legal Foundation (WLF), Allen D. Brown, Dennis H. Daugs, Greg Hayes, and L. Dian Maxwell (collectively referred to as Plaintiffs). Defendants are the Legal Foundation of

Washington (LFW), and nine Washington Supreme Court Justices (Justices) (collectively referred to as Defendants). The matter is presently before the Court on Plaintiffs' Motion for Summary Judgment, Supreme Court of Washington's Motion for Summary Judgment, and LFW Defendants' Motion for Summary Judgment, all of which are, in effect, cross-motions for summary judgment. There are no material issues fact. The Court has heard oral argument.

I. History

In 1980 federal banking regulations changed to allow negotiable order of withdrawal (NOW) accounts, that are, in effect, interest bearing checking accounts. These accounts allow attorneys to pool client funds, separate from the attorney funds, into an interest bearing account. NOW accounts may not contain funds from for-profit corporations.

These client pooled funds led to the creation of IOLTA programs in all fifty states. These programs are premised on the idea that the interest created by the pooled funds could not create a net profit (the cost of maintaining the account and dispersing individual earnings exceed the interest that the client-depositor would receive) for the client-depositor. This may be because of the period of time in which the funds are to be held, the amount of money to be held, or some combination thereof.

Washington adopted an IOLTA program for lawyers in 1985. IOLTA Adoption Order, 102 Wn.2d 1101 (1984). In the adoption order, the Washington Supreme Court considered arguments by opponents of the program, and concluded, inter alia, that the client-depositors did not have a property interest in the net profit of the IOLTA accounts, nor did the program violate the Fifth Amendment of the U.S. Constitution.

Since their creation, the WLF has challenged IOLTA programs in several state and federal courts. The most recent of these challenges, Washington Legal Fund v. Texas Equal Access to Justice Foundation (hereinafter TEAJF), 94 F.3d 996 (5th Cir. 1996), cert. granted sub nom, Phillips v. Washington Legal Foundation, 66 U.S.L.W. 3030 (July 15, 1997), was argued before the Supreme Court on January 13, 1998. The specific issue before the Court in that case is whether the client-depositors or lawyers have a property interest in the proceeds of the IOLTA accounts. The Fifth Circuit, concluded that there was a property interest.

LPOs are "lay persons [who are authorized] to select, prepare, and complete legal documents incident to the closing of real estate and personal property transactions" in proscribed situations. APR 12(a). LPOs are authorized and regulated by the Washington Supreme Court. On September 21, 1995, the Washington Supreme Court initiated a mandatory IOLTA program for the transactions handled by an LPO.

II. Stay of Proceedings

As a preliminary matter, the Justices move to stay the determination of this motion until the Supreme Court decides Philips. The Court denied a motion to stay these proceedings in its October 16, 1997, Minute Order. The Justices present no argument that would justify reconsideration of that decision.

III. Collateral Estoppel

First, the Justices argue that Plaintiffs' First and Fifth Amendment claims are barred by collateral estoppel. The Justices contend that the WLF litigated and lost claims identical to these in Massachusetts Legal Found. v. Massachu-

setts Bar Found., 993 F.2d 962 (1st Cir. 1993). Neither side contends that the Washington LPO IOLTA program could have been challenged, nor that the Justices could have been joined as defendants in Massachusetts Bar Found.

The Justices assert a form of defensive, nonmutual collateral estoppel. See Blonder-Tongue Laboratories v. University of Il. Found., 91 S. Ct. 1434 (1971). The Justices argue that Montana v. United States, 99 S. Ct. 970 (1979), provides a two prong test to determine the applicability of collateral estoppel. Namely, that they need only demonstrate that the claims are "identical" and that WLF litigated and lost in the previous action. In Montana v. United States, the United States directed individuals to litigate the constitutionality of a Montana receipt tax; there was no dispute that the United States financed and controlled the litigation. Id. at 972. On review, the Montana Supreme Court upheld the tax. Id. The individuals did not appeal to the United States Supreme Court. Id. The United States brought a second action in federal court, which challenged the constitutionality of the same Montana tax. Id. On review, the United States Supreme Court held that the United States was collaterally estopped from relitigating the same issue. Id. at 979.

Here, the Plaintiffs do not seek to relitigate the constitutionality of Massachusetts IOLTA scheme. Instead, they seek to litigate the constitutionality of a scheme that did not exist until two years after the First Circuit rendered its opinion. While clearly the Plaintiffs assert some of the same legal arguments, they challenge a different statute. Consequently, the Court declines to apply collateral estoppel to this case.

IV. Legislative Immunity

Next, the Justices argue that the claims against them should be dismissed because of legislative immunity. They allege that the Washington Supreme Court acted as a legislative body when it enacted the IOLTA program, and is therefore immune from suit regarding it. Plaintiffs do not dispute that the Washington Supreme Court acted as a legislative body in creating the program.

Both state legislators and U.S. Congressmen enjoy immunity from suits attacking their legislative acts. Supreme Court of Va. v. Consumers Union of the U.S., 100 S. Ct. 1967, 1974-54 (1980). Likewise, both state and federal judges are immune from suits attacking their judicial activities. Id. at 1976. However, state officers who are charged with enforcing laws are not always immune from suits for injunctive or declaratory relief. Id. At 1977. Consequently, the question here is whether this action attacks the Justices' legislative acts in creating the IOLTA program, or whether the action seeks to preclude the Justices from enforcing the program. The Justices contend that they only enacted the program, and that the Limited Practice Board (LPB) has the power to enforce the program.

The United States Supreme Court has recognized that supreme courts may enjoy legislative immunity when the courts promulgate rules that regulate attorneys. See id. at 1977. In Consumers Union, the Supreme Court of Virginia had the virtually exclusive power to regulate the legal profession. Id. at 1969. The court had the power to organize and govern the state bar, which was an administrative agency of the court that investigated and reported violations of the bar code. The court also had the power to prescribe the procedures for attorney discipline, which was vested in an ethics committee, and other committees.

Finally, the court had the exclusive power to discipline attorneys.

The Justices argue that their role in regulating LPOs differs from the Supreme Court of Virginia because there is no Washington statutory code that allows the Washington Supreme Court to initiate enforcement proceedings against LPOs. Neither party cites any state statute that mentions LPOs at all; it appears that LPOs exist only because the Washington Supreme Court created them.

APR 12(b)(1) states that the Washington Supreme Court created the LPB, appoints the members of the LPB, and determines their term of membership. APR (b)(2)(v) states that the LPB shall establish hearing and appeal procedures for discipline violations. That section also states that the LPB "shall take such action as may be appropriate.... [The action] may include admonitions, letters of censure, reprimands, and recommendations to the Supreme Court for the suspension and revocation of the [LPOs'] certification." APR 12(b)(2)(vi) states that the LPB shall "propose regulations to implement the provisions of this rule for adoption by the Supreme Court." APR 12(b)(2)(iii) states that the LPB only has the power to recommend to the Washington Supreme Court whether each LPO applicant should be admitted or rejected from practice.

In sum, APR 12, read as a whole, makes it clear that the LPB has no power independent of the Washington Supreme Court, and has only had procedural, not substantive duties delegated to it. Moreover, the LPB is not directly subject to any other authority. Thus, it appears that if the Washington Supreme Court wanted to have the power to initiate enforcement proceedings, it could pass a rule allowing it. Therefore, the Justices are not immune from suit against enforcing the IOLTA program.

V. Property Interest

No party disputes that owning a property interest is a prerequisite to establishing either a First or Fifth Amendment claim. Once that property interest is established, a taking may occur in either of two ways: By "direct appropriation," or by extensive regulation. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2892-93 (1992). Plaintiffs argue that two things are taken from them by the IOLTA program. The first is the actual interest accrued, or that would be accrued, in the account. The second is the benefit that the use of the funds brings.

A. IOLTA Account Interest

Plaintiffs first argue that they have a constitutionally recognized property interest in the interest that accrues in the IOLTA accounts. Principally, Plaintiffs rely on Webb's Fabulous Pharmacies v. Beckwith, 101 S. Ct. 446 (1980). In that case, the claimant attacked a Florida statute that allocated money accrued in a Florida interpleader fund as pubic money. Id. at 452. On review, the Supreme Court held that the interest followed the principal, and was thus the property of the claimants. Id. at 451. Plaintiffs argue that Webb's is particularly instructive to the instant situation because the plaintiffs in that action could not insist that their funds were placed in an interest bearing account. Id. However, Plaintiffs do not dispute that the deposit at issue in Webb's earned enough interest to cover administrative and court costs. In other words, there was a positive balance of net interest in that case. Thus, plaintiffs rely on Webb's for the general proposition that interest follows principal.

Two circuits have addressed this question. See, TEAJF, supra, 94 F.3d 996 (5th Cir. 1996), cert. granted sub nom, Phillips v. Washington Legal Foundation, 66

U.S.L.W. 3030 (July 15, 1997); Cone v. State Bar of Florida, 819 F.2d 1002 (11th Cir 1987). The Eleventh Circuit concluded that the client-depositors do not have a property interest in the IOLTA interest; the Fifth Circuit concluded the opposite.

In Cone, the Eleventh Circuit began its analysis by stating that there was no dispute that the funds that were placed into the IOLTA accounts were the property of the client-depositors. Cone 819 F.2d at 1007. The court then recognized and distinguished Webb's because the funds deposited in the IOLTA account could not, absent the IOLTA program, earn a net return for the client-depositors. Id. At 1006 n.6, 1007. Finally, the court emphasized that it did not create a de minimis standard for Fifth Amendment takings claims. Id. at 1007. Instead, the court held that the state had not taken anything that the depositor would have owned, absent the program. Id.

In TEAJF, the Fifth Circuit could find no reason that would justify a departure from the general rule that interest follows principal. TEAJF, 94 F.3d at 1002. In doing so, the Fifth Circuit looked at the actual transactions that take place for the state to earn money on the program. Namely, the Fifth Circuit found that the funds earned interest, and then the bank deducted its charges. Id. at 1003. Consequently, the court found there is a two step process, and that the depositors' ownership of the interest attached the moment that it was earned. Id. The Fifth Circuit also noted that the IOLTA programs can only exist if participation in them is mandatory. Id. This is because the interest is taxable if the depositors have any control over the interest generated in the funds. Id.

Moreover, the Fifth Circuit stated that it did not want to encourage states to look for anomalies in banking and tax laws that would lead to "unclaimed" interest. Id. The court recognized that as technology improves, so will the speed of

banking transactions. Id. At 1004. As the speed of transactions improves, the bank will be able to account and allocate smaller amounts to depositors. Id. In doing so, the Fifth Circuit implied that the costs of banking will reduce, narrowing the gap between the gross and net interest that the depositor can claim.

The Court agrees with the Cone analysis. The Fifth Circuit's reasoning overlooks the fact that in no event can the client-depositors make any net return on the interest accrued in these accounts. Indeed, if the funds were able to make any net return, they would not be subject to the IOLTA program.

When the Fifth Circuit noted that ownership in the interest attached as soon as the interest accrued, it was examining the gross gains of the account. This approach, however, is nearsighted because the bank charges and accounting fees necessarily impose a net loss. Consequently, the client-depositor would, in the end, own a property interest in nothing.

Whether a court should examine the net or gross taking has traditionally arisen in cases where real property is taken. See, e.g., Boston Chamber of Commerce v. City of Boston, 30 S. Ct. 459, 460 (1910). In those situations, the examination has taken place to ascertain damages, not whether the claimant had a property interest in the thing taken. See id. Nonetheless, a rule has developed from these cases, and that rule was aptly stated in Boston Chamber of Commerce: The takings clause "deals with persons, not with tracts of land. And the question is What has the owner lost? Not, What has the taker gained." Id. Here, the client-depositors lose the net gains, which is a negative number. The gross gains do not exist after the netted transaction costs. Consequently, they have lost nothing, and Plaintiffs have no property interest in the IOLTA program interest.

B. Benefit of Credit Earnings

Next, Plaintiffs argue that the IOLTA program unconstitutionally deprives them of the beneficial use of their deposits. Prior to the IOLTA program, the client funds would be placed in non-interest-bearing accounts. Consequently, the banks would have the use of the money without paying interest on it. The banks then awarded earnings credits, based on the average balance of the accounts. The earnings credits subsidized the bank charges, or accounting services performed by a third party. Federal regulations prohibited awarding earnings credits to the client-depositor or the depositor, but not to a non-subsidiary entity that was affiliated with the depositor. Thus, some of the escrow companies formed non-subsidiary accounting service companies, and received the benefit of the credit earnings.

In Washington Legal Found. V. Massachusetts Bar Found., 993 F.2d 962 (1st Cir. 1993), the plaintiffs "eschewed a right to the interest itself, and instead claim[ed] a property right to the beneficial use of their deposited funds, and more specifically, the right to exclude others from the beneficial use of those funds." Id. At 973. The First Circuit concluded that: "The plaintiffs have cited no sources which recognize a similar constitutionally protected right to control or exclude others from intangible property and [the court] found none." Id. at 974. Thus, a claimant must have an ownership interest in the benefit in order to assert that it has been taken. Id. In so holding, the court did not find property rights that "require the exclusion of others to preserve the property interest," see Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2872 (1984), analogous to the IOLTA program.

Plaintiffs assert that the credit earnings reduced the overhead of the escrow companies, and thus were a benefit to the Plaintiffs. Despite Plaintiffs assertions to the

contrary, this necessarily assumes that the program is effecting a regulatory taking because there is no direct appropriation of the earnings credits. See Lucas, 112 S. Ct. at 2893. Plaintiffs do not assert a property interest in the credit earnings themselves. (See, e.g., Plaintiffs' Resp. Justices' Mot. Summ. J. At 9.) Instead, Plaintiffs assert that they have a property interest in the benefit that the earnings credit create. Plaintiffs do not explain how they could have an ownership interest in a benefit when they are precluded by law from having an ownership interest in the thing that creates the alleged benefit. Consequently, there is no property interest in the credit earnings.

VI. Conclusion

In accordance with the foregoing analysis, LFW Defendants' Motion for Summary Judgment and the Supreme Court of Washington's Motion for Summary Judgment are GRANTED. Plaintiffs' Motion for Summary Judgment is DENIED.

SO ORDERED, this 30 day of January, 1998.

John C. Coughenour
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35154

D.C. No. CV-97-00146-JCC
(Western Washington)
ORDER

WASHINGTON LEGAL FOUNDATION; ALLEN D. BROWN; DENNIS H. DAUGS; GREG HAYES; L. DIAN MAXWELL,
Plaintiffs-Appellants,

v.

LEGAL FOUNDATION OF WASHINGTON; KEVIN F. KELLY; BARBARA DURHAM, Chief Justice; GERRY L. ALEXANDER, Justice; JAMES M. DOLLIVER, Justice; RICHARD P. GUY, Justice; CHARLES WAYNE JOHNSON, Justice; BARBARA A. MADSEN, Justice; CHARLES Z. SMITH, Justice; PHILIP A. TALMADGE, Justice,
Defendants-Appellees.

Filed May 9, 2001

BEFORE: SCHROEDER, Chief Judge

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. Judges McKeown and Gould were recused. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

APPENDIX E

The Takings Clause of the Fifth Amendment to the United States Constitution provides:

> [N]or shall private property be taken for public use, without just compensation.

WASHINGTON RULES OF PROF. CONDUCT RULE 1.14 - PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT

(a) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein;
(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(b) A lawyer shall:

(1) Promptly notify a client of the receipt of his or her funds, securities, or other properties;
(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them;
(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the

possession of the lawyer which the client is entitled to receive.

(c) Each trust account referred to in section (a) shall be an interest-bearing trust account in any bank, credit union or savings and loan association, selected by a lawyer in the exercise of ordinary prudence, authorized by federal or state law to do business in Washington and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, the Washington Credit Union Share Guaranty Association, or the Federal Savings and Loan Insurance Corporation, or which is a qualified public depository as defined in RCW 39.58.010(2), which bank, credit union, savings and loan association or qualified public depository has filed an agreement with the Disciplinary Board pursuant to rule 13.4 of the Rules for Lawyer Discipline. Interest-bearing trust funds shall be placed in accounts in which withdrawals or transfers can be made without delay when such funds are required, subject only to any notice period which the depository institution is required to reserve by law or regulation.

(1) A lawyer who receives client funds shall maintain a pooled interest-bearing trust account for deposit of client funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to The Legal Foundation of Washington, as established by the Supreme Court of Washington. All other fees and transaction costs shall be paid by the lawyer. A lawyer may, but shall not be required to, notify the client of the intended use of such funds.

(2) All client funds shall be deposited in the account specified in subsection (1) unless they are deposited in:

(i) a separate interest-bearing trust account for the particular client or clients matter on which the interest will be paid to the client; or
(ii) a pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client.

(3) In determining whether to use the account specified in subsection (1) or an account specified in subsection (2), a lawyer shall consider only whether the funds to be invested could be utilized to provide a positive net return to the client, as determined by taking into consideration the following factors:

(i) the amount of interest that the funds would earn during the period they are expected to be deposited;
(ii) the cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to a client's benefit; and
(iii) the capability of financial institutions to calculate and pay interest to individual clients.

(4) As to accounts created under subsection (c)(1), lawyers or law firms shall direct the depository institution:

(i) to remit interest or dividends, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, on the average monthly balance in the account, or as

otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to The Legal Foundation of Washington. Other fees and transaction costs will be directed to the lawyer;
(ii) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, and the amount of service charges deducted, if any, and the account balance(s) of the period in which the report is made, with a copy of such statement to be transmitted to the depositing lawyer or law firm.

(5) The Foundation shall prepare an annual report to the Supreme Court of Washington that summarizes the Foundation's income, grants and operating expenses, implementation of its corporate purposes, and any problems arising in the administration of the program established by section (c) of this rule.

(6) The provisions of section (c) shall not relieve a lawyer or law firm from any obligation imposed by these rules with respect to safekeeping of clients' funds, including the requirements of section (b) that a lawyer shall promptly notify a client of the receipt of his or her funds and shall promptly pay or deliver to the client as requested all funds in the possession of the lawyer which the client is entitled to receive.

(d) Escrow and other funds held by a lawyer incident to the closing of any real estate or personal property transaction are client funds subject to this rule regardless of whether the lawyer, the law firm, or the parties view the funds as belonging to clients or nonclients.

WASHINGTON ADMISSION TO PRACTICE RULES
APR 12 - LIMITED PRACTICE RULE
FOR CLOSING OFFICERS

(a) **Purpose.** The purpose of this rule is to authorize certain lay persons to select, prepare and complete legal documents incident to the closing of real estate and personal property transactions and to prescribe the conditions of and limitations upon such activities.

* * * * *

(h) **Treatment of Funds Received Incident to the Closing of Real and Personal Property Transactions.** Except to the extent certified closing officers are not required to be employed in the selection, preparation, and completion of closing documents under APR 12(g)(3), persons admitted to practice under this rule shall comply with APR 12.1 regarding the manner in which they identify, maintain and disburse funds received incidental to the closing of real and personal property transactions.

WASHINGTON ADMISSION TO PRACTICE RULES APR 12.1 - PRESERVING IDENTITY OF FUNDS AND PR0PERTY IN TRANSACTIONS CLOSED BY LIMITED PRACTICE OFFICERS

(a) For the purposes of this rule, the following definitions apply:

"Certified Closing Officer" shall mean an officer licensed in accordance with the procedures set forth in APR 12 and who has maintained his or her certification in accordance with the rules and regulations of the Limited Practice Board.

"Closing Firm" shall mean any bank, depository institution, escrow agent, title company, or other business, whether public or private, that employs or contracts for the services of a certified closing officer for the purpose of providing real or personal property closing services.

"Party" shall mean any person, corporation, partnership, or other entity, including their authorized representatives, having an interest in the real or personal property that is the subject of the transaction being closed by the certified closing officer.

"Transaction" shall mean any real or personal property conveyance requiring the involvement of an attorney or certified closing officer to select, prepare or complete documents for the purpose of closing a loan, extension of credit, sale or other transfer of title to or interest in real or personal property.

(b) For all transactions in which a certified closing officer has prepared documents under the authorization set forth in rule 12(d), the certified closing officer shall insure that all funds received by the closing firm incidental to the closing of the transaction, including advances for costs and expenses, shall be deposited into one or more identifiable

interest-bearing trust accounts maintained as set forth in section (d), and no funds belonging to the certified closing officer or the closing firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein;
(2) Funds belonging in part to the parties to the real estate or personal property transaction that is being closed and in part presently or potentially to the certified closing officer or the closing firm must be deposited therein, but the portion belonging to the certified closing officer or the closing firm may be withdrawn when due unless the right of the certified closing officer or the closing firm to receive it is disputed by the parties to the real or personal property transaction, in which event the disputed portion may not be withdrawn until the dispute is finally resolved.

(c) Each trust account referred to in section (b) shall be an interest-bearing trust account in any bank, credit union or savings and loan association, selected by a certified closing officer or the closing firm by which he or she is employed to perform closing services in the exercise of ordinary prudence, authorized by federal or state law to do business in Washington and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or the Washington Credit Union Share Guaranty Association, or which is a qualified public depository as defined in RCW 39.58.010(2), or which bank, credit union, savings and loan association or qualified public depository has filed an agreement with the Disciplinary ~~Board~~ pursuant to rule 13.4 of the Rules for Lawyer Discipline. Interest-bearing trust funds shall be placed in accounts in which withdrawals or transfers can be made without delay

when such funds are required, subject only to any notice period which the depository institution is required to reserve by law or regulation. Such account, if established in the name of the closing firm, must reference the name(s) of the certified closing officer(s) whose services are engaged in connection with the real or personal property closing activities of the closing firm.

(1) A certified closing officer who receives or whose closing firm receives funds associated with a transaction being closed by that officer shall maintain a pooled interest-bearing trust account for deposit of funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to The Legal Foundation of Washington, as established by the Supreme Court of Washington. All other fees and transaction costs shall be paid by the certified closing officer or the closing firm by which he or she is employed to perform closing services. A certified closing officer or closing firm may, but shall not be required to, notify the parties to the transaction of the intended use of such funds.

(2) All funds received from the parties to a transaction being closed by the certified closing officer, whether received by the certified closing officer or the closing firm, shall be deposited in the account specified in subsection (1) unless they are deposited in:

(i) a separate interest-bearing trust account containing funds pertaining to a specific real or personal property

closing if directed by written agreement signed by the parties to the transaction and specifying the manner of distribution of accumulated interest to the parties to the transaction;
(ii) a separate interest-bearing trust account for a particular party to a real or personal property closing on which accumulated interest will be paid to that party; or
(iii) a pooled interest-bearing account with subaccounting that will provide for computation of interest earned by each party's funds and the payment thereof to the respective party.

(3) In determining whether to use the account specified in subsection (1) or an account specified in subsection (2), a certified closing officer shall consider only whether the funds to be invested could be utilized to provide a positive net return to the client, as determined by taking into account the following factors:

(i) the amount of interest that the funds would earn during the period they are expected to be deposited;
(ii) the cost of establishing and administering the account, including the cost of the certified closing officer's services and the cost of preparing any tax reports required for interest accruing to the party(ies)' benefit; and
(iii) the capability of financial institutions to calculate and pay interest to individual parties in the manner contemplated by subsection (2).

(4) As to accounts created under section (d), certified closing officers or the closing firms on whose behalf they are engaged in performing closing services shall direct the depository institution:

(i) to remit interest or dividends, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, on the average monthly balance in the account, or as otherwise computed in accordance with an institutions standard accounting practice, at least quarterly, to The Legal Foundation of Washington. Other fees and transaction costs will be directed to the certified closing officer of the closing firm by which he or she is employed to perform closing services;
(ii) to transmit with each remittance to the Foundation a statement showing the name of the certified closing officer(s) for whom the remittance is sent, the rate of interest applied, and the amount of service charges deducted, if any, and the account balance(s) of the period in which the report is made, with a copy of such statement to be transmitted to the depositing certified closing officer or closing firm.

(d) Notwithstanding any provision of any other rule, statute, or regulation, escrow and other funds held by a certified closing officer, or the closing firm, incident to the closing of any real or personal property transaction are funds subject to this rule regardless of how the certified closing officer, closing firm, or party(ies) view the funds.

APPENDIX F

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON LEGAL FOUNDATION, *et al.*, Plaintiffs, v. **LEGAL FOUNDATION OF WASHINGTON,** *et al.*, Defendants.	) No. C97-0146C) DECLARATION OF) GERALD R. WHEELER) IN SUPPORT OF) PLAINTIFFS' MOTION) FOR SUMMARY) JUDGMENT

1. I, Gerald R. Wheeler, am over 18 years of age, and am competent to testify about the matters set forth herein. I make this declaration in support of Plaintiffs' Motion for Summary Judgment.

2. I am a C.P.A. licensed in the States of Washington and Oregon. I received a B.S. degree in accounting from the University of California at Berkeley and an M.B.A. degree with emphasis in real estate from Portland State University.

3. A significant part of the work I have performed as a C.P.A. since 1972 has involved the provision of computerized escrow accounting services for banks. I have performed such services in Washington since 1978. Since January 1, 1992, I have operated my own accounting firm in Federal Way, Washington, specializing in computer and related services. I have regularly provided services to more than 100 escrow offices. As a result of that work, I am

intimately familiar with the operations of the escrow industry in Washington.

4. I have had several articles published in the escrow industry trade press on a variety of matters, including: legislative matters affecting the escrow industry, collected funds, IRS information reporting requirements, and IOLTA. I received a special award from the Escrow Association of Washington in September 1987 for contributions to the industry and the association.

5. Historically, escrow companies and title companies have placed customer trust funds into non-interest-bearing checking accounts. The accounts were non-interest-bearing because federal law (since the Depression) has prohibited federally-insured banks and savings and loans from paying interest on checking accounts. Also, Washington law prohibited use of interest-bearing trust accounts for escrow companies unless the interest was paid to the principals or as directed by the principals. WAC 308-128E-011(1).

6. Although federal law now permits banks to offer Negotiable Order of Withdrawal (NOW) accounts (which operate like traditional checking accounts yet are permitted to pay interest), escrow and title companies have never deemed NOW accounts to be realistic options for their trust funds due to the difficulty in crediting the proper amount of interest to each person whose funds have passed through the escrow account. Another reason that NOW accounts have not been employed is that they may not be used for funds belonging to a for-profit corporation, and escrow and title companies often must handle corporate funds. Also, although WAC 308-128E-011(1) was amended in 1996 to permit interest on escrow accounts to be paid to the Legal Foundation of Washington pursuant to APR 12.1, it otherwise remains fully in force.

7. Although Washington banks have not paid interest on escrow accounts, in lieu thereof they have generally pro-

vided what are referred to in the industry as "earnings credits." Although the precise banking terms vary from bank to bank and from customer to customer, these credits generally are based on the amount of funds maintained in the escrow account. The credits can generally be applied against fees that would otherwise be payable to the bank for a variety of services rendered by the bank. Such services include escrow trust accounting services (as described in a staff legal opinion letter of the Board of Governors of the Federal Reserve System dated April 26, 1994; the letter concluded that payment by banks for such services did not constitute the improper payment of interest); and wire transfers. The escrow trust accounting services provided by my C.P.A. firm have usually been paid for by banks; those banks have generally applied the "earnings credits" from escrow accounts against the cost of my services, with the result that the banks have not imposed a net charge against the escrow accounts for my services. Those services are of significant value to those whose funds have been deposited in escrow accounts. The services are particularly valuable in the event of a bank failure: federal deposit insurance is unavailable in excess of $100,000 per escrow account unless the accounting records maintained in good faith from day to day are able to ascertain the separate beneficial interests within the pooled custodial account. A copy of the April 26, 1994 Federal Reserve letter is attached hereto as Exhibit A.

8. Following adoption of APR 12(h) and 12.1, many Washington banks have been unwilling to offer earnings credits on escrow accounts. Bank officials have explained to me that they cannot afford both to pay interest on IOLTA accounts and provide earnings credits. In the absence of such credits, bank customers are now paying for many services that formerly were "free" (in the sense that earnings credits generally were more than sufficient to offset charges imposed for such services). A few banks have found a way

to provide some earnings credits in addition to payment of interest to the IOLTA program, but the earnings credits for trust accounting services are greatly diminished and often insufficient to cover the costs of needed services.

9. Some or all of those costs inevitably are passed along by escrow and title companies to their customers. Some escrow companies have taken to including those bank charges as a separate item on closing statements. Attached hereto as Exhibit B is the closing statement from a recent real estate transaction in Washington in which the escrow company imposed a fee, denominated as an "IOLTA fee," for costs incurred due to the adoption of APR 12(h) and 12.1 and the resulting disappearance of earnings credits. Other escrow companies simply include the bank charges as part of general overhead costs. Because overhead costs are a major factor in determining a company's pricing structure, the bank charges ultimately are borne in whole or in part by escrow customers. This is ironic, in that deposits that generate interest for the IOLTA program belong to those same customers who now have to pay higher costs because bank earnings credits on their deposits are no longer available to subsidize the cost of closing their real estate transactions.

I state under penalties of perjury that based on my personal knowledge the foregoing is true.

s/ Gerald S. Wheeler

Dated: November 3, 1997

[Attachments to the Declaration have not been reprinted.]

No. 01-1325

Supreme Court, U.S.
FILED
MAY 8 2002
CLERK

IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION; ALLEN D. BROWN; DENNIS H. DAUGS; GREG HAYES; and L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR LEGAL FOUNDATION OF WASHINGTON AND ITS PRESIDENT

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QUESTIONS PRESENTED

1. Does *per se* takings analysis apply to a regulation that requires legal professionals to place clients' small or short-term deposits of principal, incapable of providing a positive net return to the client, in pooled trust accounts with banks that agree to pay some interest on the accounts to a state-created foundation for access to justice?

2. Does the Just Compensation Clause of the Fifth Amendment require that compensation be paid for a taking that does not result in any financial loss to the owner?

PARTIES TO THE PROCEEDING

In addition to the current parties named in the caption, the following were previously parties in this action.

1. During the course of this case, the following successsively have been presidents of the Legal Foundation of Washington, and thus technically were defendants themselves in their respective official capacities: Kevin F. Kelly (during 1997), Bradley C. Diggs (1998), Dwight S. Williams (1999), the Honorable Gregory J. Tripp (2000), and the Honorable Cynthia Imbrogno (2001).

2. When Petitioners commenced this case, they named all the then-Justices to the Supreme Court of Washington as defendants in their official capacities. Petitioners then voluntarily dismissed their claims against Justice Richard B. Sanders. The following former Justices were parties, but have been replaced by the Justices that are named in the caption: Barbara Durham, James M. Dolliver, Richard P. Guy, and Philip A. Talmadge.

Respondent Legal Foundation of Washington has no parent corporation and no publicly owned company owns any stock in it.

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IN THE

Supreme Court of the United States

No. 01-1325

WASHINGTON LEGAL FOUNDATION; ALLEN D. BROWN; DENNIS H. DAUGS; GREG HAYES; and L. DIAN MAXWELL,

Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR LEGAL FOUNDATION OF WASHINGTON AND ITS PRESIDENT

In *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), the Court expressly declined to reach the questions of whether Interest on Lawyers' Trust Account ("IOLTA") rules result in a taking and, if so, whether any just compensation must be paid.

Upon remand by the Court in *Phillips*, the District Court held a trial on the merits, made findings of fact, and answered the two questions not answered in *Phillips* in favor of the Texas IOLTA program. *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 86 F. Supp. 2d 624 (W.D. Tex. 2000). On appeal, a divided three-judge panel of the Fifth Circuit reversed. *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 270 F.3d 180 (5th Cir. 2001) ("*TEAJF*"). The Fifth Circuit applied a *per se* analysis to the question whether a taking had occurred, *id.* at 188, and then evaded the just compensation question by relying on the particular procedural posture of that case, *id.* at 189-90. A petition for rehearing *en banc*, filed on October 26, 2001, is pending before the Fifth Circuit.

In this case, the Ninth Circuit, sitting *en banc*, answered both questions unresolved in *Phillips*. The Ninth Circuit, carefully analyzing the summary judgment record, determined that the appropriate analysis on the first question was the multi-factor approach of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978). Applying this analysis, the Ninth Circuit held that the State of Washington's IOLTA program did not result in a taking. The court alternatively held that, even if a taking had occurred, the proper amount of just compensation was zero. The Ninth Circuit remanded Petitioners' First Amendment claims to the District Court, which has not yet addressed those claims.

Accordingly, the first two circuits to analyze the first question unanswered in *Phillips* disagree whether IOLTA rules are subject to *per se* takings analysis. Because the Fifth Circuit avoided answering the question of what amount of compensation, if any, is due if IOLTA regulations do result in a taking, there is not a split on this question. At best, there is a disagreement as to whether that subsequent question is a necessary part of the constitutional analysis.

Despite the current split between the Fifth Circuit and the Ninth Circuit, the Court should deny the Petition. The split will be eliminated if the Fifth Circuit grants the pending petition for rehearing *en banc* and thereby vacates its panel decision. In any event, the Court will have other opportunities to address these issues at a later date, either in this case (which currently is interlocutory because of the remand on the First Amendment issue), in *TEAJF*, or in a subsequent case.

There is no split in the circuits on Petitioners' second Question Presented, which asks the Court to resolve, in the abstract, what circumstances might justify a federal court in enjoining a taking by a State or a State actor. This question was only reached by the Ninth Circuit in the context of the peripheral issue of whether the Washington Legal Foundation ("WLF") has standing—an issue that WLF does not even challenge directly in the Petition. Accordingly, if the Court grants the Petition to resolve the questions left open in *Phillips*, Respondents submit that review should be confined to the two Questions Presented as phrased herein by Respondents.[1]

STATEMENT OF THE CASE

Petitioners' statement of the case in places ignores important facts and the procedural context in which the evidence was presented. In the District Court, Respondents moved for summary judgment on the sole basis that Petitioners did not have a cognizable property interest, as

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[1] References in this Opposition to "Respondents" means the Legal Foundation of Washington and its current president, Katrin E. Frank, as the remaining respondents are submitting a separate brief. The Petition is unclear at times as to which of the individual Petitioners it is referring. When necessary to differentiate between the individuals, Respondents will refer to the two clients making claims, Brown and Hayes, as the "Client Petitioners" and the two Limited Practice Officers who asserted claims, Daugs and Maxwell, as the "LPO Petitioners."

Phillips had not yet been decided. By contrast, Petitioners moved for summary judgment on all issues. Thus, the issues now before the Court are presented in the context of Petitioners' motion for summary judgment.

A. The IOLTA Rules Support Legal Services by Getting Banks to Share a Portion of Their Profits on Deposited Funds on Which Clients Cannot Achieve a Positive Net Return.

It cannot be overemphasized that the IOLTA rules mandate that only funds incapable of achieving a positive net return for the client are to be deposited into an IOLTA account. Funds capable of achieving a positive net return for the client must be deposited in a manner calculated to obtain that return.

The placement in pooled IOLTA accounts of small or short-term client deposits that are incapable of achieving a positive net return for the client does not result in any economic loss to the client. Prior to the IOLTA rules, these funds still were pooled in bank accounts that paid no interest to the clients. The banks were able to retain all the earnings that they achieved on these pooled bank accounts.

In *Phillips*, the Court held that an incident of ownership of principal funds is ownership of interest actually accrued on those funds. 524 U.S. at 168. *Phillips* did not suggest that owners never gave away this incident of ownership to banks. Neither before nor after the passage of the IOLTA rules have clients received, or even controlled, this incident of ownership when their principal funds could not achieve a positive net return for them. Rather, clients allowed their lawyers to deposit such funds with banks that, in exchange for holding and protecting the principal funds, are given complete control over any accrued interest or other profit.

The effect of the IOLTA rules is to reduce the discretion given to lawyers as to where to deposit client funds. Previously, lawyers had complete discretion over which banks held their clients' funds and thus which banks were given the right to keep the interest accrued on deposited funds incapable of achieving a positive net return. For instance, a lawyer's decision could be based on a particular bank's support of a particular charity. Pursuant to the IOLTA rules, lawyers must deposit the funds at a bank that meets certain qualifications to protect the integrity of the deposit (*i.e.*, is insured). And when the deposits are incapable of achieving a positive net return for the client, the lawyers must deposit the funds at a bank that has agreed to pay a portion of its profits on those accounts to the Legal Foundation of Washington to support indigent legal services—a cause that Petitioners and the dissenters below acknowledge is laudable. App. 51a.

B. Petitioners Do Not Fully and Accurately Describe the Evidence Presented With Respect to Washington's Extension of IOLTA to Limited Practice Officers.

Petitioners' statement of the case discusses the system of "earnings credits" that some escrow companies utilize to derive a financial benefit for themselves from depositing their customers' funds that they are holding in escrow at particular banks. Petitioners intimate that the Client Petitioners lost something of value as a result of Washington's extension of its IOLTA rules to Limited Practice Officers ("LPOs").[2]

Escrow companies are prohibited by regulation from deriving any benefit from the funds that they hold in escrow. Wash. Admin. Code § 208-680E-011. This regulation is not

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[2] Petitioners, however, later assert that Washington's extension of its IOLTA rules to LPOs is "immaterial to the constitutional analysis," Petition at 15, and the remainder of the Petition makes no reference to earnings credits.

specific to escrow companies that employ LPOs. It is true, notwithstanding the edict of the regulation, some escrow companies selected banks for the indirect benefits that they provided to the escrow companies in the form of earnings credits.[3] Petitioners assert that these credits "directly reduce costs to customers for services." Petition at 6. This assertion is not supported by the record. Indeed, there is at most a genuine issue as to whether these credits provide even an indirect and partial cost reduction to some customers of such escrow companies. App. 36a.

Some banks may not provide earnings credits on IOLTA accounts. Petitioners contend that this results in higher costs to the escrow companies, which they argue "inevitably are passed along by escrow and title companies to their customers." Petition at 6. Again, Petitioners have failed to prove this allegation, and they are not entitled to such an unreasonable inference. Respondents presented the only real expert opinion on this issue, which was that there was nothing "inevitable" about the effect of the loss of earnings credits on customers, as opposed to escrow and title companies. App. 36a.[4]

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[3] Escrow companies historically placed all client funds, regardless of the size of the deposit, in pooled non-interest-bearing accounts. As a result, these escrow companies achieved the benefit of earnings credits even on funds that were capable of earning a positive net return for the client if deposited in an individual interest-bearing account.

[4] Petitioners suggest that "all funds received in connection with a transaction being closed by an LPO" are placed in IOLTA accounts "as a practical matter." Petition at 6. LPOs have a regulatory obligation to obtain a positive net return for their clients under the IOLTA rules when that is possible. What Petitioners really are saying is that LPOs do not bother to obtain a positive net return for clients for whom this is possible. This does not constitute State action. In any event, the Client Petitioners do not contend that their deposits were of sufficient size or length that they could have obtained a positive net return on those funds if deposited outside of an IOLTA account.

Most importantly, regardless what experts opine generally might happen, the reality is that neither of the Client Petitioners established that they paid any more for their real estate closings as a result of the IOLTA rules. They offered no evidence that they were charged any additional fee. Indeed, they did not even offer evidence that their funds were deposited at a bank that ceased paying earnings credits to their escrow companies. The Client Petitioners simply did not suffer any financial impact from the IOLTA rules.

SUMMARY OF REASONS FOR DENYING THE PETITION

1. The Court should deny the Petition because the Fifth Circuit has yet to rule on the petition for rehearing *en banc* in *TEAJF*, and a decision by that court to grant rehearing will eliminate the split in the circuits upon which the Petition relies.

2. There also are a number of practical reasons why the Court should deny the Petition even if the Fifth Circuit does not grant the petition for rehearing *en banc*. For one, this case comes to the Court on Petitioners' motion for summary judgment. As a result, if the Petition were granted, the Court could conclude that issues of fact prevent it from finally resolving the important constitutional questions. Moreover, the summary judgment record was prepared prior to the Court's decision in *Phillips*. In contrast, there was a full trial in *TEAJF* upon remand from *Phillips* that was specifically focused on the questions left open by the Court in *Phillips*.

There also could be some confusion among those unfamiliar with LPOs if the Court were to grant review in this case. IOLTA regulations exist in 50 states and the District of Columbia, but Washington's extension of IOLTA to LPOs is unique. Respondents agree with Petitioners' current contention that it makes no difference to the constitutional analysis, *see* Petition at 15, but Petitioners may later attempt to argue to the contrary (as they did below).

Even if the Court believes that this case presents an appropriate vehicle for resolving the questions left unanswered by *Phillips*, it will have an opportunity to do so at a later date. This case will continue on remand to the District Court to decide Petitioners' First Amendment claims. The Court should wait until the issues on remand have been resolved below rather than accepting review at this interlocutory stage.

3. The Ninth Circuit correctly decided the two issues that the Court did not reach in *Phillips*. On the issue whether the IOLTA rules result in a taking, the central points of disagreement between the parties (and between the *en banc* Ninth Circuit and the Fifth Circuit panel) regard "the character of the governmental action," *see Penn Central*, 438 U.S. at 124, and the specific property to be considered—the entirety of Petitioners' property interests or only the interest that accrued in the IOLTA accounts. Although Petitioners concede in their Questions Presented that IOLTA is a regulatory program, the Petition otherwise ignores the regulatory aspects of Washington's IOLTA rules.

Regardless how these points are resolved, there remains one undeniable constant: The government action imposes no economic impact on clients and thus imposes no interference with clients' investment-backed expectations. Petitioners do not attempt to argue otherwise, instead pressing for expanded application of *per se* takings analysis. Petitioners do this because they cannot prevail absent such an expansion of *per se* takings analysis.

The Petition does not challenge the Ninth Circuit's conclusion that, even if there is a taking, the appropriate just compensation is zero. It instead incorrectly leaps to the issue of whether equitable relief is available. Petitioners put the remedy wagon before the liability horse. The Fifth Amendment does not forbid takings; it bars takings without the payment of just compensation.

4. There is no split in the circuits as to the availability of injunctive relief. The Ninth Circuit only touched on the question as part of its analysis of whether the WLF had representative standing. In contrast, the Fifth Circuit in *TEAJF* reached the issue in the posture of its erroneous conclusion that defendants had conceded that injunctive relief was available to the client plaintiff. *TEAJF*, 270 F.3d at 194-95. Respondents have made no such concession in this case.

To argue for injunctive relief, Petitioners rely on precedents dealing with federal programs and thus with the breadth of the Tucker Act, 28 U.S.C. § 1491. Those cases did not address the federalism implications of a federal court's enjoining an alleged taking by a State. They certainly do not compel the conclusion that injunctive relief is available in these circumstances.

ARGUMENT

I. THE COURT SHOULD NOT GRANT THE PETITION TO REVIEW WHETHER IOLTA RULES EFFECT A *PER SE* TAKING FOR WHICH JUST COMPENSATION HAS BEEN DENIED.

A. The Ninth Circuit's Decision That Washington's IOLTA Rules Did Not Cause a Taking Is Consistent With the Court's Decisions.

"Beginning where the Supreme Court left off in *Phillips*," App. 2a, the Ninth Circuit, sitting *en banc*, carefully analyzed whether Washington's IOLTA rules resulted in a taking from the Client Petitioners without payment of just compensation.[5] The Ninth Circuit determined that it should answer the first

[5] The Fifth Circuit and the Ninth Circuit agreed that the legal professionals (whether they be LPOs or lawyers) have no cognizable takings claim because the only alleged taking is of the property of the client, the owner of the principal, not of the legal professionals. *See TEAJF*, 270 F.3d at 188; App. 13a.

question—whether a taking had occurred—under the *Penn Central* framework. App. 27a-32a. In reaching this conclusion, the Ninth Circuit correctly observed that the takings analysis cannot focus only on the interest paid by banks to the Legal Foundation of Washington, but must look at the combination of the principal and interest, because the accrued interest "'attaches as a property right incident to the ownership of the underlying principal'" rather than a stand-alone property right. App. 26a (quoting *Phillips*, 524 U.S. at 168).

Weighing the three factors set forth in *Penn Central*, the Ninth Circuit concluded that (1) the IOLTA rules had no economic impact on the owners of the principal funds because no interest would have been earned by them on those funds absent the IOLTA rules, and because Petitioners failed to establish that they suffered any economic impact as a result of an alleged loss of "earnings credits," App. 33a-38a; (2) by definition under Washington's IOLTA rules, the Client Petitioners could not have expected their principal to achieve a positive net return, so the IOLTA rules could not have interfered with their investment-backed expectations, App. 38a-39a; and (3) the government action at issue is properly characterized as a regulation of the uses of the Client Petitioners' property (constituting the principal and any interest incident thereto, in the aggregate) in the context of the highly regulated fields of banking and law, App. 39a-40a.[6]

[6] The Fifth Circuit did not undertake the *Penn Central* analysis in *TEAJF*. Petitioners nevertheless contend that "the Fifth Circuit *clearly believed* that the Texas IOLTA program effected an uncompensated taking of private property regardless whether it was examined using a *per se* or *Penn Central* analysis." Petition at 16-17 (emphasis supplied). In fact, the Fifth Circuit provided no indication of its views under *Penn Central*, which requires consideration of a regulation's economic impact on the takings claimant. 438 U.S. at 124. The Fifth Circuit expressly stated that, under the *per se* rule, "the economic impact on the owner is a non-factor in the takings analysis." *TEAJF*, 270 F.3d at 188 n.6.

The Ninth Circuit's *en banc* decision abides by the prior decisions of the Court and is consistent with the Court's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. __, No. 00-1167 (Apr. 23, 2002).

As the Ninth Circuit recognized, the Court carefully and explicitly limited its holding in *Phillips*: "'We express no view as to whether these funds have been 'taken' by the State; nor do we express an opinion as to the amount of 'just compensation, if any, due respondents.'" App. 25a-26a (quoting *Phillips*, 524 U.S. at 172). Unable to assert a direct conflict with *Phillips*, and despite the explicit disclaimer in *Phillips*, Petitioners contend that the Ninth Circuit's decision is in tension with certain "*language*" in *Phillips*, "*indicating* that establishing a Takings Clause claim is not dependent on a showing that the plaintiff could benefit by opting out." Petition at 19 (emphasis supplied). Petitioners quote the following language from *Phillips*: "'We have never held that a physical item is not "property" simply because it lacks a positive economic or market value.'" *Id.* (quoting *Phillips*, 524 U.S. at 169). The Court's statement concerned the issue of whether the interest income earned on IOLTA accounts constituted an incident of ownership of the deposited principal funds, not the issues presented in this case.

The Court recently reaffirmed that the Ninth Circuit was correct in rejecting Petitioners' attempt to manufacture a *per se* takings claim by focusing solely on one narrow, isolated

Moreover, Petitioners' suggestion that *Penn Central* has become a "toothless check on government powers" such that the Court "has expressed an interest in 'restoring balance to [the *Penn Central*] inquiry,'" Petition at 17 n.6 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)), is incorrect. There certainly is no split in the circuits on whether the Court should overrule *Penn Central*. Justice O'Connor's statement about "restor[ing] balance" to the *Penn Central* inquiry reiterates the importance of weighing all the *Penn Central* factors and does not call for abandonment of the *Penn Central* approach.

aspect of the property (just the interest allegedly earned in the IOLTA accounts in which the Client Petitioners' principal funds were deposited), while ignoring the effect the IOLTA regulations have on the property (the principal) as a whole. The Court repeated "*Penn Central's* admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'" *Tahoe-Sierra*, slip op. at 27 (quoting *Penn Central*, 438 U.S. at 130-31; citing *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). *See also Phillips*, 524 U.S. at 175 n.3 (Souter, J., dissenting) (observing that it would be error to read the majority opinion in *Phillips* as allowing one to focus only on the client's interest in the interest actually generated, rather than on the client's complete package of incidents of ownership in the principal funds deposited in evaluating whether a taking without just compensation occurred).

The Court has recognized two discrete exceptions to the analysis of *Penn Central*, both of which involve real property: a regulation that (1) results in a "physical 'invasion'" of property or (2) "denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The "default rule" remains the "more fact specific inquiry" of *Penn Central*. *Tahoe-Sierra*, slip op. at 28; *see also Lucas*, 505 U.S. at 1017-18 (*per se* takings are "extraordinary" and only occur in "relatively rare situations"). The second category of *per se* takings is clearly inapplicable. The first category is limited to physical invasions of real property. *See Lucas*, 505 U.S. at 1015, citing as an example *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), which involved a challenge to a law that required landlords to permit cable television companies to physically invade real property

to install cable wires. The Court specifically noted in *Loretto* that "permanent physical occupation of real property" was what constituted a *per se* taking. *Loretto*, 458 U.S. at 427.[7]

In *Tahoe-Sierra*, the Court observed that application of *per se* takings analysis applies to "physical appropriations" that are "easily identified." *Tahoe-Sierra*, slip. op. at 19. In the case of real property, "whether a permanent physical occupation has occurred presents relatively few problems of proof." *Loretto*, 458 U.S. at 437. Money is fungible, and the line between physical appropriations and the spreading of the burdens and benefits of life is not so easily identified. *Penn Central*, 438 U.S. at 123-24. To apply the *per se* takings analysis to monetary payments would open a broad range of government actions to constitutional challenge. *See Phillips*, 524 U.S. at 178-79 (Souter, J., dissenting) (citing withholding of income taxes as an example).

The Court has repeatedly recognized the distinction between regulations of real property and regulations imposing direct or indirect monetary assessments or fees. For example, in a takings challenge to the Coal Act's imposition of monetary liability on an employer for an employees' benefits fund, the Supreme Court stated that this "is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a *per se* taking." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 530 (1998) (citing *Loretto*, 458 U.S. at 441). The Court made the same distinction in a case involving the exaction of a percentage of any award made by the Iran Claims Commission. *See United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (it is

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[7] Although the Petition states that "the infringement in *Loretto* was found to be a taking despite evidence that the infringement *increased* the value of the property at issue," Petition at 20, this statement relies on a point made by the dissent in *Loretto*, which the majority criticized as "speculative." *See Loretto*, 458 U.S. at 437 n.15.

"artificial to view deductions [from] a monetary award as physical appropriations of property" because "[u]nlike real or personal property, money is fungible").

Petitioners argue that *Phillips* limited *Sperry* to cases involving a fee imposed for services. Petition at 21. But that was not the rationale used in *Sperry*, and *Phillips* imposes no such limitation. The Court's only discussion of *Sperry* in *Phillips* was by a "*cf.*" citation for the unremarkable proposition that "[o]ur holding does not prohibit a State from imposing reasonable fees it incurs in generating and allocating interest income." *Phillips*, 524 U.S. at 171. This statement does not support Petitioners' conclusion that only fees-for-services regulations fall outside of the *per se* rule.[8] The Court has refused, in at least four cases not involving a government fee for service, to apply *per se* analysis to government assessments of money. *See Eastern Enterprises*, 524 U.S. at 529-30; *Concrete Pipe*, 508 U.S. at 643-44; *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986).[9]

Petitioners try to make much of the short opinion in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *Webb's* does not support application of the *per se* rule here because that case was decided before *Loretto*, in which the Court concluded that the *per se* applies to physical invasions of real property. The Court's analysis in *Webb's* is inconsistent with Petitioners' suggestion that it applied a *per*

[8] In addition, the Court has emphasized that nonregulatory takings carried out by physical occupations of property occur "only where [the government] requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (emphasis omitted). The required submission is not present in this case.

[9] Lower courts have understood that the Court has differentiated between money and real property. *See, e.g., Branch v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (government exactions of money "are not treated as *per se* takings").

se takings approach, as the Court repeatedly cited *Penn Central* and analyzed the question, "What would justify the county's retention of that interest?" 449 U.S. at 162. Such an inquiry into public purpose is irrelevant in a *per se* analysis. As to the facts of *Webb's*, it was undisputed that the principal could earn a net return and that its owners expected to receive a net return on the interpleaded funds. Even Petitioners admit that neither of these circumstances exists here.

B. The Ninth Circuit's Decision on the Just Compensation Question Is Consistent With the Court's Decisions.

The Ninth Circuit's conclusion that, even if a taking had occurred, no compensation was due the Client Petitioners, App 41a-45a, is not in conflict with any decision of the Court. In examining whether just compensation is due, "the question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). Petitioners offer no precedent to support their argument that this rule has no relevance here, where the property allegedly taken is money. To use Petitioners' words, it is "readily ascertainable" what the Client Petitioners lost—zero. App. 38a.

After all, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 194 (1985). *See also Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("In view . . . of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.") (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-09 (1923)); *Marion & Rye Valley Ry. Co.*

v. United States, 270 U.S. 280, 282 (1926) ("[E]ven if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the government to pecuniary loss.").

Petitioners are unable to seriously challenge the Ninth Circuit's conclusion that, even if a taking had occurred, the appropriate just compensation is zero. Petitioners instead leap to the issue of whether equitable relief is available. The Fifth Circuit made this same leap in *TEAJF*. After stating that "once a taking is found, the question becomes what amount of, not whether, just compensation is due," *TEAJF*, 270 F.3d at 189, the Fifth Circuit proceeded to ignore the very question it posited – to what amount of compensation was the client entitled? Ignoring that the trial record in that case established that the correct "amount" of just compensation was zero, the Fifth Circuit skipped to an analysis of equitable relief.[10]

Thus, there really is no split in the circuits as to whether the just compensation for the alleged taking caused by IOLTA rules is zero. Rather, the disagreement relates to whether it makes any difference to the constitutional analysis that Petitioners did not (because they cannot) establish any financial loss. Under the plain language of the Constitution, it must make a difference. The original Ninth Circuit panel decision (which the *en banc* dissent adopted) similarly recognized that the just compensation question could not be ignored, but believed that a remand was necessary to answer the question what amount, if any, compensation was owed after concluding that a taking had occurred. App. 85a ("just

[10] *See TEAJF*, 270 F.3d at 200 (Wiener, J., dissenting) ("We need not pause to ponder whether freestanding equitable relief can *ever* be an appropriate remedy for an unconstitutional taking, for *in this case* there is no unconstitutional (*i.e.*, uncompensated) taking.").

compensation for the takings may be less than the amount of the interest taken, or nothing, depending on the circumstances, so determining the remedy requires a remand").

C. The Two-Circuit Split on the Questions Left Undecided in *Phillips* Will Be Eliminated if the Fifth Circuit Grants the Petition for Rehearing *En Banc*, and if the Split Is Not Eliminated, the Court Will Have Subsequent Opportunities to Address Those Questions.

It would be premature to grant the Petition to review the questions left undecided in *Phillips*. Most importantly, the principal basis for the Petition—the split between the Ninth Circuit and the Fifth Circuitwould be eliminated if the Fifth Circuit grants the pending petition for rehearing *en banc*. Despite the passage of time since that petition was filed, there is reason to believe that it still will be granted. For example, *Tahoe-Sierra* provides further support that the conclusions of the Fifth Circuit are incorrect. The Fifth Circuit concluded that the Court's decision in *Phillips* on the private property question predetermined the outcome of the questions the Court refused to reach. *TEAJF*, 270 F.3d at 188 ("the linchpin for this case has already been inserted by the Supreme Court"). The Fifth Circuit then applied the *per se* takings analysis of *Lucas*, 505 U.S. at 1015, to hold that Texas' IOLTA rules effected a taking of the interest income of a client's funds. 270 F.3d at 188. The Fifth Circuit also inappropriately focused solely on the interest accrued because of IOLTA in conducting its takings analysis.

Even if the Fifth Circuit ultimately denies the petition for rehearing *en banc*, the Court will have other opportunities in the near future to decide the questions unanswered by *Phillips*. *TEAJF* itself would provide the Court with a vehicle to decide those issues within the same action as *Phillips*, and with the benefit of a full trial on the merits following the

Court's remand in *Phillips*. The existence of factual findings from a trial record, as opposed to the summary judgment record in this case, might prove useful to the Court in resolving the issues. *See Tahoe-Sierra*, slip op. at 30 ("recovery on either a bad faith theory or a theory that the state interests were insubstantial is foreclosed by the District Court's unchallenged findings of fact").

The Court also will have another opportunity to review the questions presented in the Petition within this case. There has yet to be any resolution of Petitioners' claim that Washington's IOLTA rules violate their First Amendment rights. The Ninth Circuit remanded that issue to the District Court. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court").[11]

II. THIS IS AN INAPPROPRIATE CASE TO DECIDE WHAT CIRCUMSTANCES MIGHT WARRANT INJUNCTIVE RELIEF IN A TAKINGS CASE.

The Court should decline Petitioners' invitation to delve into an analysis of when a federal court may enjoin a taking by a State or State actor. There is no split between the circuits on this issue. Nor was the record developed on that issue below. Moreover, Petitioners ask the Court to expand legal concepts set forth in cases involving federal programs to a case challenging a State program.

[11] At a minimum, the Court should hold the Petition until the Fifth Circuit acts on the petition for rehearing *en banc*. Respondents are informed that, if the Fifth Circuit were to deny the petition, TEAJF is prepared to file a petition for writ of certiorari within a few weeks. This would allow the Court to be fully informed as to which of these two cases is best suited for certiorari, or even grant review in both.

A. The Circuits Are Not Split on the Question Whether Injunctive Relief Is Available.

Having concluded that no taking occurred and, even if it did, that the just compensation to which the Client Petitioners were entitled was zero, the Ninth Circuit had no occasion to decide whether the Client Petitioners were entitled to injunctive relief. Instead, the sole discussion of injunctive relief related to whether the WLF had standing. App. 18a-19a.

The Ninth Circuit did not squarely reach the question that Petitioners pose, because it is predicated on the Client Petitioners' first proving a taking without payment of just compensation, which they were unable to do. Consequently, there is no record on the question implicit in the Petition: whether an adequate provision for obtaining just compensation exists in either federal or state court. Consequently, Petitioners' criticism that the Ninth Circuit did not fully define the circumstances in which injunctive relief might be available, Petition at 24, is disingenuous. Because of its different procedural posture, *TEAJF* is not in conflict. The Fifth Circuit held that a taking had occurred and jumped over the just compensation question. *TEAJF*, 270 F.3d at 189. That court then reached the remedy issue, *id.* at 189-91, unlike the original Ninth Circuit panel that indicated that remedy should be decided on remand to the District Court.[12] App. 85a. Moreover, the Fifth Circuit identified as the primary basis for holding that injunctive relief was available

[12] After concluding that a taking had occurred, the original Ninth Circuit panel (which the *en banc* dissent adopted) determined that a remand was appropriate as to remedy. App. 85a. In doing so, the panel observed that *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), "does prevent the court in most circumstances from enjoining the taking itself," and that "[t]he clients are entitled to just compensation, not to prevention of the taking . . . ." App. 79a. In any event, a record on the availability of monetary relief would have been developed on remand.

its conclusion that the defendants had conceded that injunctive relief could be awarded. 270 F.3d at 190.[13] Respondents made no such concession.

The Petition erroneously downplays these procedural differences between this case and *TEAJF*. Petitioners also fail to articulate what specific circumstances they contend justify equitable relief. Although they try to argue that the facts of this case support entry of an injunction, they justify that result by possible other "imagined" circumstances. Petition at 30.[14]

In short, Petitioners ask the Court to provide general guidance on abstract questions with implications for the balance between branches of government and between separate sovereigns. The Court should decline to do so.

B. The Court Has Never Recognized the Availability of Injunctive Relief in the Circumstances of This Case.

Each of the Just Compensation Clause cases to which Petitioners cite as allowing an injunction involved claims against the United States. Thus, the cases dealt with the power of the federal courts to award injunctive relief against the United States where it had not waived sovereign immunity for monetary relief under the Tucker Act, 28 U.S.C. § 1491, not the appropriateness of enjoining a taking

[13] As the dissent pointed out, this conclusion is of questionable validity. *Id.* at 196 (Wiener, J., dissenting).

[14] The Petition obfuscates several other important questions. For instance, the Petition is not even clear as to which parties it contends might be entitled to an injunction. The Ninth Circuit held that the LPO Petitioners lacked standing because they had no cognizable property interests. App. 16a-17a. Petitioners do not challenge this conclusion, yet at the end of the Petition assert that "all Petitioners should be permitted to go forward with their Fifth Amendment claims." Petition at 30.

in general.[15] They certainly do not support the proposition that the federal courts may enjoin States or State actors from taking property when the State, as here, has waived its sovereign immunity to suits for inverse condemnation in its courts.

Recognizing that they cannot establish the lack of an available procedure for obtaining just compensation (if it is due), Petitioners make the remarkable argument that the federal courts should be able to enjoin a taking whenever it would be inconvenient or difficult for a plaintiff to obtain monetary relief. The Petition asserts that the Court "appears to have recognized" in *Babbitt v. Youpee*, 519 U.S. 234 (1997), that equitable relief is appropriate whenever the amount at issue is "so minimal as to make a legal action for damages impractical." Petition at 29-30.

Youpee does not support this argument. The Court did not provide any explanation in *Youpee* why it affirmed the entry of declaratory and injunctive relief. Nor do the underlying decisions provide an explanation. *Youpee v. Babbitt*, 67 F.3d 194 (9th Cir. 1995); *Youpee v. Babbitt*, 857 F. Supp. 760 (D. Mont. 1994). A subsequent plurality of the Court observed that *Youpee* and *Hodel v. Irving*, 481 U.S. 704 (1987), presented "situations analogous" to that presented in *Eastern Enterprises*, and thus those cases "assumed the lack of a

[15] The plurality in *Eastern Enterprises* based its decision on Congress' withdrawal of Tucker Act jurisdiction for monetary claims arising under the Coal Act. 524 U.S. at 521 ("Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act"). *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995), and *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397 (D.C. Cir. 1997)—both decided before *Eastern Enterprises*—are based on the same rationale. *See In re Chateaugay*, 53 F.3d at 493; *Riley*, 104 F.3d at 401-02.

compensatory remedy . . . without discussing the applicability of the Tucker Act." *Eastern Enterprises*, 524 U.S. at 521.[16]

Petitioners' argument is especially problematic in the context of federal court review of a State program. It would be remarkable for a federal court to enjoin a State merely because it would be inconvenient for a plaintiff to obtain monetary relief in state court. *Cf. Florida Prepaid Post-secondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 644 (1999) (Congress does not have authority to abrogate the States' sovereign immunity where primary point of witnesses who testified before Congress "was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies"). Similarly, a federal court should not be empowered to enjoin a State merely because the Eleventh Amendment prohibits the *federal court* from awarding monetary relief. *See Alden v. Maine*, 527 U.S. 706, 748 (1999) ("the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine" if the Court believed the States did not retain constitutional sovereign immunity in their own courts) (citing *Ex parte Young*, 209 U.S. 123 (1908)); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270-71 (1997) (most important application of *Ex parte Young* "is where there is no state forum available to vindicate federal interests").

[16] Further evidence that there was no monetary remedy available to the plaintiffs in those cases is the fact that the appeals were not to the Federal Circuit, in which exclusive jurisdiction lies for appeals from final decisions of the district courts exercising jurisdiction under the "Little Tucker Act," 28 U.S.C. § 1346(a). 28 U.S.C. § 1295. In addition, in *Hodel* and *Eastern Enterprises*, there was considerable disagreement about whether the Takings Clause was even applicable, or whether the government action should be evaluated under the Due Process Clause. *See Hodel*, 481 U.S. at 731 n.14 (Stevens, J., concurring); *Eastern Enterprises*, 524 U.S. at 539 (Kennedy, J., concurring and dissenting in part). Petitioners do not assert that the IOLTA rules violate due process.

Petitioners elected not to pursue their claims in state court.[17] It would be completely incongruous if Petitioners could now use their selection of a federal forum as a justification for a broader remedy than would be available in state court.

Given the context in which equitable relief was discussed in the Ninth Circuit *en banc* decision, this is not an appropriate case for the Court to address this difficult issue with important federalism implications. Thus, if the Court grants the Petition, review should be limited to the two Questions Presented in this Opposition.

CONCLUSION

The Ninth Circuit carefully analyzed and correctly decided the two questions left unanswered by *Phillips*. The Fifth Circuit panel decision in *TEAJF* is the only other appellate ruling since *Phillips* on these issues. Although the Fifth Circuit's decision currently conflicts with the Ninth Circuit's

[17] Before the Ninth Circuit, Respondents questioned whether Petitioners' claims were ripe for federal court review under *Williamson County*, 473 U.S. at 186. The Ninth Circuit concluded that it would be futile for Petitioners to pursue their claims in state court and thus that Petitioners could seek relief in federal court without litigating first in state court. App. 21a (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999)). The Ninth Circuit relied on the fact that the Justices of the Washington Supreme Court have asserted in this federal action that no Fifth Amendment violation has occurred. *Id.* It is not self-evident that the Justices who are parties to this action would be the final authority on Petitioners' claims. First, appeals from the Washington Court of Appeals to the Washington Supreme Court are discretionary. Washington Rule of Appellate Procedure 13.3. Moreover, the Justices might recuse themselves in such a challenge to the constitutionality of the IOLTA rules. *See Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817 (9th Cir. 2002) (in case challenging constitutionality of Ninth Circuit rule, all judges of the Ninth Circuit recused themselves, and judges sitting by designation decided case). Of course, the Court could review any decision of the highest state court, however constituted, on issues of federal law.

en banc decision, the Fifth Circuit may still resolve that split by granting the petition for rehearing *en banc*. Review of this case is premature because of the likelihood that the split will be eliminated and the lack of finality on Petitioners' First Amendment claims. If the Petition is granted, review should be confined to the Questions Presented as set forth herein by Respondents.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 8 2002
OFFICE OF THE CLERK

NO. 01-1325

IN THE SUPREME COURT
OF THE UNITED STATES

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, AND L. DIAN MAXWELL,

PETITIONERS,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF THE JUSTICES OF THE WASHINGTON SUPREME COURT

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QUESTIONS PRESENTED

Washington regulates the handling of client trust funds by legal professionals. The regulation challenged in this case, Washington's IOLTA (Interest On Lawyer Trust Accounts) rule ensures that client trust funds (1) earn a positive net return for the client whenever they are capable of doing so; (2) are not used for the benefit of the legal professional when they are incapable of earning a positive net return for the client; and (3) in the latter circumstance, are placed in an account that generates funding for public legal services, including legal services for the indigent. Admission to Practice Rule 12(h), 12.1.

1. Does Washington's IOLTA rule result in a *per se* taking?

2. Are clients whose trust funds are deposited in IOLTA accounts entitled to compensation under the Fifth Amendment, when they could not have realized a positive net return on their funds in the absence of the challenged rule?

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INTRODUCTION

Like numerous states, Washington regulates legal professionals in handling client trust funds. One such regulation, Rule of Professional Conduct 1.14(c), requires lawyers receiving client trust funds to place the funds in an interest-bearing account for the benefit of the client in any circumstances under which the funds may generate net interest for the client. When a lawyer receives client trust funds that cannot generate net interest for the client, the rule requires the lawyer to pool the client's funds with like-funds in an interest bearing account, known as an IOLTA account. The rule directs interest earned on IOLTA accounts to a nonprofit corporate entity, Respondent Legal Foundation of Washington, to be distributed for indigent legal services App. at 99a-102a.[1]

An essentially identical IOLTA rule, the rule challenged by the Petitioners, applies to persons licensed in Washington in the limited practice of law, e.g., "limited practice officers" or "certified closing officers". Washington Admission To Practice Rule (APR) 12(h), 12.1. App. at 103a-108a. These legal professionals are licensed and regulated by the Washington Supreme Court to select and complete legal documents necessary to effectuate property transactions. APR 12. App. at 103a.

Petitioners seek a writ of certiorari on two questions. In essence, Petitioners ask whether the challenged IOLTA rule effects a *per se* taking of interest earned on IOLTA accounts, and whether injunctive relief would be an available remedy, assuming a taking. Petition For Writ Of Certiorari (Pet.) at i. Respondent Justices of the Supreme Court of

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[1] App. refers to the Appendix To The Petition For A Writ Of Certiorari.

Washington respectfully request the Court to deny the petition for several reasons. First, the decision below is interlocutory, Petitioners' First Amendment claim having been remanded to the district court. App. at 45a. There is no compelling reason to consider review at this juncture. Second, Petitioners place significant reliance on a current conflict between the Ninth Circuit and a panel of the Fifth Circuit in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation* (*TEAJF*), 270 F.3d 180 (5th Cir. 2001) over whether IOLTA constitutes a *per se* taking. The conflict remains uncertain, however, as the Fifth Circuit has yet to rule on a petition for rehearing *en banc* in *TEAJF*. If the petition is granted, the panel decision would be vacated, and Petitioners' principal argument for certiorari would disappear. Third, the Ninth Circuit properly held that the challenged rule does not fall within the narrow class of government actions that constitute *per se* takings. The Ninth Circuit carefully and correctly applied the ad hoc takings analysis appropriate in all but the most extraordinary circumstances. Finally, Petitioners' question concerning the availability of injunctive relief is not presented in this case and it is not an appropriate vehicle for resolving the question.

STATEMENT

1. History Of IOLTA Relating To Lawyers

Washington's IOLTA program was established by rule of the Washington Supreme Court in 1984. *IOLTA Adoption Order*, 102 Wash. 2d 1101, 1102 (1984). As originally adopted, Washington's IOLTA rule applied only to attorneys. Washington Rule Of Professional Conduct (RPC) 1.14.

Prior to adoption of the IOLTA rule, Washington's rules of professional responsibility did not govern an attorney's conduct with respect to investing client trust funds held in connection with providing legal services. As the

Washington Supreme Court observed in *IOLTA Adoption Order* in 1984, then existing rules of professional responsibility "d[id] not address the question of whether attorneys must invest such funds for the benefit of clients". *IOLTA Adoption Order*, 102 Wash. 2d at 1102. In general, the rules provided that "attorneys must hold client trust funds in accounts separate from their own funds, and are obligated to maintain complete records and pay the funds over to the clients or others as soon as they are entitled to receive them". *Id.* See also American Bar Association Formal Opinion 348 (1982), concluding that in most instances where a lawyer is entrusted with client funds, the lawyer is merely under a duty to safeguard the funds and is not liable for interest for failing to invest them.

In *IOLTA Adoption Order*, the Washington Supreme Court explained that prior to IOLTA, lawyers "usually" invested client trust funds in interest-bearing accounts and paid the interest to clients when it was economically feasible to do so. By the same token, the Washington Supreme Court recognized that when Washington lawyers received client trust funds that could not generate net interest for the client, because the costs of establishing and administering an interest-bearing account would exceed any interest that could be earned, "most attorneys" simply deposited the funds into a single noninterest-bearing trust checking account. *IOLTA Adoption Order*, 102 Wash. 2d 1102. As the Washington Supreme Court noted, this situation essentially resulted in interest-free use of client funds by banks. *Id.*

This pre-IOLTA treatment of client trust funds likely resulted, at least in part, from two circumstances. First, client funds needed to be available on demand; and second, prior to 1980, federal law prohibited federally insured banks from paying interest on checking accounts. In 1980, Congress authorized interest-bearing Negotiable Order Of Withdrawal (NOW) accounts under those circumstances where the entire

beneficial interest in the account is in one or more individuals or a nonprofit organization operated primarily for religious, philanthropic, charitable, educational, political or similar purposes. 12 U.S.C. § 1832.

With adoption of the IOLTA rule, Washington's rules of professional conduct required lawyers receiving client trust funds to place the funds in an interest-bearing account for the benefit of the client, in any circumstances in which they could generate net interest for the client. With adoption of IOLTA, Washington's rules of professional conduct required lawyers who received client trust funds that could not generate net interest for the client to pool the client's funds with other such client trust funds in an interest-bearing account, with the interest paid to a nonprofit corporate entity, to be distributed for public legal services.

Washington's rule authorizes the deposit of client trust funds in an IOLTA account only when it is not possible for the funds to earn net interest for the client. *IOLTA Adoption* Order, 102 Wash. 2d at 1101 ("[W]e make clear that those funds available for the IOLTA program are only those funds that cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client."). In this respect, the rule is "self-adjusting", requiring legal professionals to invest more client trust funds for clients as more cost-effective accounting services become available and make it possible to earn net interest on "increasingly smaller amounts held for increasingly shorter periods of time". *IOLTA Adoption Order*, 102 Wash. 2d at 1114.

2. History Of IOLTA Relating To Limited Practice Officers

In 1981, the Washington Supreme Court held that the selection and completion of legal documents necessary to effectuate property transactions constituted the practice of

law. *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 635 P.2d 730 (Wash. 1981). At that time, it had become common for such services to be provided by escrow and title companies without the benefit of a lawyer. Shortly thereafter, the Washington Supreme Court adopted rules to license and regulate legal professionals performing these functions. APR 12. These licensed legal professionals are referred to as "limited practice officers" (LPO's), or sometimes as "certified closing officers".

In 1995, the Washington Supreme Court considered a proposal to apply the IOLTA rule to transactions handled by LPOs, in addition to lawyers. As Petitioners acknowledge, prior to the challenged IOLTA rule, escrow and title insurance companies never deemed interest-bearing client trust accounts a "realistic option[] for their trust funds due to the difficulty in crediting the proper amount of interest to each person whose funds have passed through the escrow account" and because "they may not be used for funds belonging to a for-profit corporation". Pet. at 5. Escrow and title companies maintained this practice even after Congress authorized interest-bearing NOW accounts in 1980. App. at 33a.

The Washington Supreme Court received public comment on the proposal to extend the IOLTA rule to LPOs and solicited argument. In a brief arguing for application of the IOLTA rule to LPOs, the Washington State Bar Association noted that LPOs and lawyers were similarly situated with respect to the rule and pointed out that escrow and title companies employing LPOs were receiving substantial indirect benefits from banks in return for noninterest-bearing client trust deposits. The Bar Association's brief expressed concern that such benefits fostered the potential for serving self-interest, rather than client interest, in the handling of client funds, and in the handling of these legal transactions. Petitioners acknowledge

that firms employing LPOs received benefits from their banks in return for noninterest-bearing client trust fund deposits, in the form of "earnings credits". Pet. at 5. These credits—a function of the size of the noninterest-bearing deposits, the period the deposits were held, and a contracted percentage rate—are applied by escrow and title companies to pay for accounting and other services provided to them.[2] Washington's relatively recent consideration of IOLTA in the context of LPOs thus provides insight into marketplace opportunities for legal professionals in directing the deposit of client trust funds when banks are not required to pay interest on such funds, and makes apparent the opportunity for legal professionals to serve self-interest rather than their client's interest in placing client funds in the absence of the IOLTA rule.

The Washington Supreme Court adopted the challenged IOLTA rule for transactions handled by LPOs. In all relevant respects, the rule is identical to the rule that applies to lawyers. Thus, APR 12.1(c)(3) protects clients by requiring LPOs to deposit client trust funds in an interest-bearing account for the benefit of the client whenever it is possible to earn a net return for the client. As is the case with lawyers, APR 12.1(c)(1) also requires LPOs to pool client trust funds that cannot earn a net return for the client in an interest-bearing IOLTA account with the proceeds directed to the Legal Foundation of Washington. Thus, the IOLTA rule ensures that when a client's trust funds are not able to generate a net return for the client, the funds will not be used to benefit the legal professional, creating the potential for conflicts of interest, but will be pooled with other like-client

[2] This practice existed despite a state regulation that prohibited escrow agents from using such funds for their own benefit. Wash. Admin. Code § 208-680E-0011.

funds in an IOLTA account, to provide legal services to the poor.

3. Proceedings Below

Petitioners filed a complaint in the United States District Court for the Western District of Washington, challenging Washington's IOLTA rule governing limited practice officers. The plaintiffs were two clients of LPOs whose escrow funds were placed in an IOLTA account under APR 12(h) and 12.1(c)(1) (Brown and Hayes), an LPO (Daugs), a former LPO (Maxwell), and the Washington Legal Foundation, a public interest law organization. Petitioners alleged that Washington's IOLTA rule constituted a taking of property without just compensation and that it violated the First Amendment by requiring support of expressive activities with which they disagree.

On cross motions for summary judgment, the district court held that owners of funds placed in an IOLTA account had no cognizable claim to the earnings of IOLTA accounts, because their funds could not have generated such interest in the first instance. Finding such an interest "a prerequisite to establishing either a First or Fifth Amendment claim", the district court granted summary judgment to Respondents. App. at 92a, 96a. Petitioners appealed.

While hearing on Petitioners' appeal was pending in the Ninth Circuit, this Court decided *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). There, in the context of a Fifth Amendment challenge to Texas' IOLTA rule, the Court held that interest earned on IOLTA accounts is the property of the clients whose principal is deposited in the accounts. The Court expressly did not consider whether the Texas IOLTA rule constituted a taking or, if it did, what compensation, if any, would be due. *Id.* at 172.

Subsequently, a three-judge panel of the Ninth Circuit reversed the district court, held that Washington's IOLTA rule falls within the narrow class of government action that constitutes a *per se* taking, and remanded the Fifth Amendment claim to the district court for a determination of just compensation, if any. The three-judge panel did not reach Petitioners' First Amendment claim. App. at 84a. Respondents petitioned for rehearing and rehearing *en banc*. Respondents' petition was granted, and the decision of the three-judge panel was vacated.

On rehearing *en banc*, the Ninth Circuit first held that only petitioners Brown and Hayes, LPO clients whose funds were placed in IOLTA accounts in connection with real estate transactions, had standing to challenge Washington's IOLTA rule under the Fifth Amendment. The court below then held that the challenged rule is not within the narrow class of government actions that constitute *per se* takings. App. at 31a-32a. Reviewing the challenged rule under the ad hoc analysis that applies to Fifth Amendment takings claims, except in extraordinary circumstances, the Ninth Circuit held that Washington's IOLTA regulation does not constitute a taking. App. at 40a-41a. The court below correctly considered the fact that (1) the IOLTA rule had no impact on the reasonable economic expectations of either of the owners of the principal placed in IOLTA accounts (Brown and Hayes), as neither would have earned a net return on their funds in the absence of the rule (App. at 33a); (2) neither Brown nor Hayes demonstrated that their transactions were more costly as a result of the IOLTA rule (App. at 38a); (3) neither Brown nor Hayes had any investment-backed expectation that their funds would earn interest while in escrow (App. at 38a-39a); and (4) the challenged rule serves important public purposes with respect to the legal system, from which Brown and Hayes benefit (App. at 40a). The Court of Appeals also held that even if Washington's IOLTA

regulation constituted a taking, the LPO clients would be entitled to nothing by way of just compensation, as IOLTA took from them no property interest that they would have had in the absence of the challenged rule. App. at 41a-45a. Having determined that Petitioners failed to establish a Fifth Amendment claim, the Ninth Circuit ordered no relief. The Court of Appeals remanded Petitioners' First Amendment claim to the district court. App. at 45a.

REASONS FOR DENYING THE PETITION

1. The Interlocutory Nature Of The Decision Below Argues Against Review

Petitioners' First Amendment challenge to IOLTA has not been resolved. This Court has declined requests for review on the basis that a federal court decision, like the decision below, is interlocutory. *See, e.g., Bhd. of Locomotive Firemen & Enginmen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967). Such decisions pose the risk of premature and piecemeal consideration. Moreover, denial of interlocutory review does not jeopardize the opportunity for review when the case is fully ripe. This case does not present circumstances sufficiently compelling that the Court should overlook its procedural posture. Review at this juncture is not warranted.

2. The Circuit Conflict On Which Petitioners Rely May Prove To Be Temporary

It is true as Petitioners assert that there presently is a conflict between the decision of the Ninth Circuit and the decision of a three judge panel of the Fifth Circuit in *TEAJF*, 270 F.3d 180, over whether IOLTA constitutes a *per se* taking. However, it is uncertain whether the conflict will continue, as a petition for rehearing *en banc* remains pending in *TEAJF*. If the petition is granted, one primary basis for review offered by Petitioners will cease to exist and may not

again arise. The conflict on which Petitioners rely offers no compelling reason to review the question whether the IOLTA rule effects a *per se* taking in this case. Petitioner Washington Legal Foundation is a party in *TEAJF*, and there is little reason to doubt that the Court will have the opportunity to consider a petition for certiorari in *TEAJF* regardless of its ultimate outcome.

3. The Decision Below Is Entirely Consistent With The Court's Takings Jurisprudence

The Ninth Circuit analyzed the challenged rule under the broadly applicable ad hoc takings analysis of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-25 (1978). In light of the public welfare purposes of the rule and its nonexistent effect on Petitioner clients' reasonable economic expectations, the Ninth Circuit correctly concluded that Washington's IOLTA rule effects no taking. Alternatively, the Ninth Circuit held that even if the rule resulted in a taking, just compensation to the Petitioner clients would be zero. App. at 45a. Petitioners do not challenge the conclusions reached by the Ninth Circuit under this analysis. Rather, based on their view that Washington's rule constitutes a *per se* taking, Petitioners contend that the analysis does not apply.[3]

[3] The Petitioners raise a *per se* takings claim in this Court, repeatedly asserting that the challenged IOLTA rule "confiscates" interest earned on client funds deposited in IOLTA accounts. Pet. at i, 10, 17 n.6, 19, 21, 29. Consistent with this single claim, Petitioners contend that the interest earned on their funds placed in IOLTA accounts is the measure of "just compensation". *See* Pet. at 22 (cases valuing property taken "ha[ve] no relevance here, where the property taken is money and thus has a readily ascertainable value"). Petitioners' argument regarding injunctive relief also makes this plain. *See* Pet. at 28 ("just compensation" under the challenged IOLTA rule would be a dollar for dollar repayment of interest earned on IOLTA accounts). In this respect, Petitioners here, like the petitioners in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). "do not contend that the State's regulation of the manner in which [legal professionals] hold and manage client funds amounts to a taking of private property". *Phillips*, 524 U.S. at 164. Accordingly, Petitioners' discussion of "earnings credits" at page 6 of their Statement Of The Case is irrelevant.

A. None Of The Cases Cited By Petitioners Suggest That IOLTA Is Within The Narrow Class Of Regulations That Constitute *Per Se* Takings

Petitioners cite three cases as supporting their claim that Washington's IOLTA rule is among the narrow class of regulations that the Court has determined to be *per se* takings, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). None support the Petitioners' position, and numerous decisions of the Court demonstrate Petitioners' error.[4]

At issue in *Webb's* was whether a statute authorizing a county to retain interest earned on interpleaded funds, in addition to a separate service fee, constituted a taking of the interest. The *Webb's* opinion demonstrates that the Court engaged in what subsequently has been labeled ad hoc takings analysis. The Court considered the nature and purpose of the government's action, the legitimate

[4] Petitioners make the remarkable assertion that the Fifth Circuit would have found Texas' IOLTA rule a taking "regardless whether it was examined using a *per se* or *Penn Central* analysis". Pet. at 16-17. Petitioners cite nothing in the decision of the Fifth Circuit to support this conclusion or their novel view that regulatory takings are simply a subcategory of *per se* takings. Petitioners' argument is wholly circular and, in the end, amounts to nothing more than saying that a *per se* taking is a *per se* taking. Pet. at 17 n.6.

expectations of Webb's creditors, and the statute's economic effect on them. The Court examined possible justifications for the county's retention of the interest (*Webb's*, 449 U.S. at 162-63); noted the necessity of resorting to the statute if the depositor was to have any protection from creditor claims (*id.* at 164); and considered that "Webb's creditors . . . had more than a unilateral expectation" in the interest earned on the interpleaded funds (*id.* at 161). Moreover, it was plain that the interpleaded funds were large enough to earn a substantial net return for Webb's creditors absent the state's intervention. The *Webb's* Court did not simply identify the interest as the property of Webb's creditors, declare a *per se* taking, and end its inquiry. Instead, the Court weighed the public and private interests involved and found a taking "under the narrow circumstances of this case" only after concluding that there was not "any reasonable basis to sustain the taking of the interest". *Id.* at 164, 163.

Sperry Corp. is no more helpful to Petitioners' call for *per se* takings analysis than is *Webb's*. In that case, Sperry Corporation challenged as a taking, a fee imposed by the United States on users of the Iran-United States Claims Tribunal. The Court rejected the challenge and in doing so disavowed a fundamental premise of Petitioners' argument and the *TEAJF* decision. Petitioners essentially contend that IOLTA interest should be treated as though it is real or personal property, and its payment to the Legal Foundation of Washington as though it is tantamount to an invasion or physical appropriation of property. *Sperry Corp.* rejected the notion that a payment of money should be analyzed as a physical appropriation of property.

> "It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. . . . If the deduction in this case were a physical occupation requiring just compensation, so

> would be any fee for services". *Sperry Corp.*, 493 U.S. at 62 n.9.

So too, would be any payment or cost associated with a regulation that may be expressed in a specific dollar amount. As *Sperry Corp.* recognized, "[s]uch a rule would be an extravagant extension of *Loretto*." *Id.* [5]

To similar effect is *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee*, the Court rejected an argument by a mobile home park owner that the combination of a rent control ordinance and a mobile home residency law effected a physical taking of his property by transferring wealth from the park owner to incumbent mobile home owners. The Court explained that the particular regulatory scheme might make the transfer of wealth "more *visible* than in the ordinary case but the existence of the transfer itself does not convert regulation into physical invasion". *Yee*, 503 U.S. at 529-30 (cite omitted). The Court plainly has sustained against takings challenges government regulations that transfer value from private parties, whether or not the value is expressed as a specific dollar amount. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (holding that the Multiemployer Pension Plan Amendments Act of 1990 did not constitute a takings challenge, where "there is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability".); *Concrete Pipes & Prod. of California, Inc. v. Constr. Laborers Pension Trust For Southern California*, 508 U.S. 602 (1993).

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[5] Petitioners seem to suggest that under *Sperry Corp.*, costs associated with government regulation constitute *per se* takings unless they can be justified as user fees. Pet. at 21-22. Neither *Sperry Corp.* nor *Phillips* supports such a notion, and the notion itself is belied by the fact that virtually all government regulation entails costs to regulated parties.

Nor does *Phillips* argue for the approach suggested by Petitioners and taken by the Fifth Circuit in *TEAJF*. *Phillips* addressed the single narrow question of whether interest earned on IOLTA accounts is the property of the clients whose funds are deposited in such accounts. *Phillips* held that it is. The Court expressly declined to consider "whether these funds have been 'taken' by the State . . . [or] the amount of just 'compensation,' if any, due respondents", and left those issues for remand. *Phillips*, 524 U.S. at 172. *Phillips* thus hardly signals the "sea change" in takings analysis that the Petitioners posit.

Petitioners seek exceptional treatment of the challenged IOLTA rule in arguing that the Court should categorize it as a *per se* taking. *Tahoe-Sierra Preservaion Coun., Inc. v. Tahoe Regional Planning Agency*, No. 00-1167, 2002 WL 654431, *17 (U.S. Apr. 23, 2002), reaffirms the broad application of multifactor takings analysis and the Court's long resistance "to adopt what amount to *per se* rules in either direction". (Quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)). As the Court explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), "[i]n 70-odd years of . . . regulatory takings jurisprudence [succeeding *Pennsylvania Coal Co .v. Mahon*, 260 U.S. 393 (1922)], we have generally eschewed any set formula for determining how far is too far, preferring to engag[e] in . . . essentially ad hoc factual inquiries". *Lucas*, 505 U.S. at 1015 (internal quotation marks omitted). The Court identified only "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint": "regulations that compel the property owner to suffer a physical 'invasion' of his property", and "regulation [that] denies all economically beneficial or productive use of land". *Lucas*, 505 U.S. at 1015. The challenged IOLTA rule fits neither of these

categories. Moreover, in light of the rule's nonexistent effect on Petitioners' reasonable economic expectations, and in light of the evident dissimilarities between physical invasions of real property and transfers of intangible monetary value, there is no reason for categorical treatment of the IOLTA rule.

B. The Decision Below Is Faithful To The Purpose Of The Takings Clause And Its Analytical Framework In Concluding That The IOLTA Rule Does Not Effect A Taking

The Takings Clause is not intended to bar government regulation of property. Government regulation does not implicate the Takings Clause unless it "goes too far" (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)), and "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Whether government regulation goes too far "depend[s] on a complex of factors including the regulation's economic effect . . . the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action". *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, (2001) (citing *Penn Central Transp. Co.*). As the Court recognized in *Palazzolo*, it is consideration of these several factors that informs the question of whether government regulation "goes too far".

The Ninth Circuit analyzed Washington's IOLTA rule in light of this "complex of factors". As the Ninth Circuit concluded, the factors dictate that the challenged IOLTA rule does not effect a taking. Considering first the nature of the government action, APR 12.1 is regulatory. It governs the handling of client trust funds by legal professionals to ensure that (1) the deposits earn net interest

for the client whenever they are capable of doing so; (2) the deposits are not used for the benefit of the licensed legal professional when they are incapable of earning net interest for the client; and (3) in the latter circumstance, the deposits are placed in an account that generates funding for public legal services, including legal services for the indigent. In each of these respects, the rule substantially furthers the public welfare. It safeguards important interests of clients whose deposits it regulates, and it benefits the civil justice system.

Turning next to the economic effect of the challenged regulation on the client and any interference with investment-backed expectations, it must be observed that trust funds directed to IOLTA accounts by the challenged rule would earn no net return for the client in the absence of the rule. Indeed, such funds would not have been put in an interest-bearing account at all, absent the IOLTA rule. For the same reason, it cannot be said that the rule interferes with any reasonable investment-backed expectation of clients. The clients in this case readily admit that they had no expectation of earning a return on these funds. App. at 38a-39a. On the other hand, the rule requires client trust funds that are capable of earning a net return for the client to be put in an interest-bearing account for the benefit of the client. In addition, the challenged rule does not interfere with the purposes for which the clients placed their funds in the commercial marketplace in the first instance. Under the rule, client trust funds directed to an IOLTA account remain available to the client without delay and accomplish all of their intended purposes. APR 12.1(c).

For each of the reasons noted by the *en banc* court below, it cannot be said that Washington's IOLTA rule goes too far and forces clients "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". *Armstrong*, 364 U.S. at 49.

C. The Decision Below Is Consistent With The Court's Takings Jurisprudence In Concluding That Just Compensation In This Case Would Be Zero

The purpose of "just compensation" under the Fifth Amendment is to place the property owner in the same economic position that the owner would have been in absent the government action constituting the taking. *Olson v. United States*, 292 U.S. 246, 255 (1934). Even if there were a taking here, there is no dispute that, absent the challenged IOLTA rule, Petitioner clients could not have realized net interest on their trust funds. *Phillips* recognized that "the interest income at issue here may have no economically realizable value to its owner". *Phillips*, 524 U.S. at 170. In asserting as "just compensation" the interest earned on IOLTA accounts (Pet. at 22), Petitioner clients do not claim property that they would have had in the absence of the challenged rule, for they could not have generated net interest on their trust funds. Rather, they claim what the government has gained. This is contrary to the Court's jurisprudence confirming that under the Fifth Amendment "the question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910); *United States ex rel. Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 281-82 (1943).[6] In concluding that even if the challenged rule effected a taking, just compensation would be zero, the court below, like this Court, declined to turn a blind eye to economic reality. The Fifth Amendment does not require government "to pay for a loss

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[6] Petitioners offer no authority and no logical justification for the assertion that this well-established principle is limited to takings involving real property. Pet. at 22.

of theoretical creation, suffered by no one in fact". *Boston Chamber of Commerce*, 217 U.S. at 194.

4. This Case Presents No Occasion To Address The Circumstances Under Which Injunctive Relief May Be An Available Remedy For A Takings Claim

The availability of injunctive relief under the circumstances posited by the Petitioners' second question presented was not addressed by the decision below. The Ninth Circuit addressed injunctive relief in this case only in the limited context of determining that the Washington Legal Foundation lacks representational standing to bring its Fifth Amendment claim.[7] This holding is not challenged in the petition and, accordingly, is not before the Court. *Yee*, 503 U.S. at 535 (under Rule 14.1(a), "only the questions set forth in the petition, or fairly included therein, will be considered by the Court").[8]

An association such as the Washington Legal Foundation has standing to sue on behalf of its members only if, *inter alia*, "neither the claim asserted nor the relief requested requires the participation of individual members in

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[7] Petitioners state that the court below relied on the unavailability of injunctive relief in holding that the LPOs in this case, Daugs and Maxwell, lack standing to assert a takings claim. Pet. at 23 n.9. This is not correct. The Ninth Circuit held that neither of these parties has a property interest in IOLTA earnings and that, absent such an interest, neither has standing to assert a Fifth Amendment claim. App. at 16a, 17a.

[8] Similarly, the petition does not seek review of the Ninth Circuit's holding that only Petitioners Brown and Hayes, LPO clients whose funds were placed in IOLTA accounts, have standing to challenge Washington's IOLTA rule under the Fifth Amendment. Thus, Petitioners' references to the Fifth Amendment claims of parties other than Brown and Hayes should be disregarded.

the lawsuit". *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977), App. at 17a. In this case, the Ninth Circuit reached the unremarkable conclusion that the appropriate remedy for the Petitioners' taking claim, if any remedy were required, would be to provide "just compensation" to the clients whose property allegedly was taken. App. at 18a. As the Ninth Circuit concluded, determining "just compensation" necessarily requires the participation of individual members whose property allegedly was taken, and their necessary involvement means that standards for asserting representational standing have not been met. App. at 19a.

Petitioners posit this discrete standing determination as a holding on the availability of injunctive relief in takings cases that creates a conflict of authority in the circuits. This does not withstand scrutiny. As Petitioners recognize, the Ninth Circuit "neither defined the circumstances in which such relief is available nor engaged in any detailed analysis whether, in this case, compensation would adequately remedy the alleged violation of Fifth Amendment rights". Pet. at 24. This likely results from the fact that Petitioners never suggested in this case that "just compensation" would fail to adequately address the alleged taking. Moreover, the Ninth Circuit found no taking warranting *any* remedy. Thus, it hardly is surprising that the decision below had little to say on the subject of injunctive relief. Moreover, to the extent the Ninth Circuit discussed the availability of injunctive relief in takings cases, it recognized that such relief ordinarily is not the appropriate remedy, but in certain limited circumstances, such relief has been granted. App. at 18a. This effects no change in the law relating to takings. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by

law, when a suit for compensation can be brought against the sovereign subsequent to the taking." (Footnote omitted.)).

In addition, the Court of Appeals cases from the Second and D.C. Circuits cited by Petitioners are not in conflict with the decision below. They proceed from the notion that injunctive relief is available with respect to a taking where a statute requires a person to pay money directly to the government, and just compensation would be a dollar for dollar repayment of that amount by the government. Under such circumstances, the cited courts have assumed that the government has no intention of providing dollar for dollar compensation for the required payment. *See In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995); *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 401-02 (D.C. Cir. 1997). Here, there is no such payment and even the initial three-judge panel and the *en banc* dissent, adopting the panel opinion, concluded that just compensation would not necessarily amount to a dollar for dollar payment of IOLTA interest. App. at 85a. The only other case cited by Petitioners in support of their claimed split with the Ninth Circuit concerning the availability of injunctive relief is *TEAJF*, and it too is inapposite. In *TEAJF*, the Fifth Circuit concluded that monetary relief was not available and that the defendants had conceded the availability of injunctive relief. Regardless of whether the Fifth Circuit was correct in these respects (*see TEAJF*, 270 F.3d at 196 (Wiener, J., dissenting)), that is not the case here.

Finally, Petitioners' request that the Court consider the availability of injunctive relief in this case also seems to be based on an unstated assumption that Washington would maintain its IOLTA rule and yet decline to make compensation available in the face of a final judicial determination that compensation is required under the Fifth Amendment. Petitioners' assumption fails to accord to the state respect for the rule of law. *Dombrowski v. Pfister*, 380

U.S. 479, 485 (1965) ("It is generally to be assumed that state courts . . . will observe constitutional limitations as expounded by this Court[.]").

In sum, this case presents no occasion for the Court to consider the circumstances under which injunctive relief may be available to remedy a taking.

CONCLUSION

For each of these reasons, the Petition For Writ Of Certiorari should be denied.

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May 8, 2002

Supreme Court, U.S.
FILED
MAY 20 2002
OFFICE OF THE CLERK

(6)

No. 01-1325

IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR PETITIONERS

Respondents do not take issue with the principal contentions made in the Petition. They admit that the Ninth Circuit's decision in this case directly conflicts with the Fifth Circuit's holdings: (1) that IOLTA ("Interest on Lawyers' Trust Accounts") programs violate the Fifth Amendment by confiscating private property without providing appropriate compensation; and (2) that plaintiffs challenging IOLTA programs are entitled to declaratory and injunctive relief to remedy that violation. They agree with Petitioners that the issues raised by the Petition are of significant public importance, particularly given that all 50 States and the District of Columbia operate IOLTA programs and that the fate of all such programs depends on how the split between the Fifth and Ninth Circuits is resolved. They do not dispute that the issues over which the circuits disagree are the very issues that the Court directed be addressed on remand in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), in which the Court held that interest income earned on IOLTA accounts is the private property of those whose funds generated the income.

Because they cannot avoid making these concessions, Respondents are largely reduced to criticizing the Fifth Circuit's decision, issued more than seven months ago. But such criticism does not make the inter-circuit conflict go away. Moreover, the pendency of a motion for rehearing *en banc* in the Fifth Circuit case is not a proper basis for denial of the Petition. The constitutionality of legal services funding programs in all 50 States is too important an issue to render appropriate any further delay in its resolution. Ever since *Phillips*, the constitutionality of IOLTA programs has been open to serious question. *Phillips* has spawned new Fifth Amendment challenges to IOLTA programs, and others

are likely to follow. *See* Brief of *amici curiae* Citizens for the Preservation of Constitutional Rights, *et al.* (describing pending constitutional challenge to Massachusetts IOLTA program). Given that IOLTA programs generate revenues in excess of $100 million dollars each year, the need for early resolution of the issues raised by *Phillips* cannot be overestimated.[1]

Respondents also assert that this case is a poor vehicle for resolving the questions presented and/or that review is premature. *See* LFofW Br. 8-9; Brief of Justices of the Washington Supreme Court ("Justices Br.") 9. Those assertions are not well taken. Petitioners' Takings Clause claims are as well-developed as they will ever be: the Ninth Circuit affirmed the final dismissal of all such claims. While Petitioners' First Amendment claims are still open on remand to the district court, it is the Fifth Amendment issues that were the focus of *Phillips*, and it is the Fifth Amendment issues -- not the First Amendment issues -- over which the Fifth and Ninth Circuits are in conflict.

Moreover, this case in many ways is a better vehicle than the Fifth Circuit case for addressing the Takings Clause issues. Because the Fifth Circuit held that the Texas IOLTA program amounted to a *per se* violation of the Takings Clause, it had no occasion to analyze the program under the *ad hoc* approach outlined in *Penn Central Transportation Co.*

---

[1] Alternatively, if the Court attaches significance to the pendency of a rehearing petition in the Fifth Circuit, Petitioners agree with Respondents Legal Foundation of Washington and Frank (hereinafter "LFofW") that the Court may wish to defer consideration of this Petition until the Fifth Circuit rules on the rehearing petition. LFofW Br. 20 n.11.

v. City of New York, 438 U.S. 104 (1978). *See Washington Legal Found. v. Texas Equal Access to Justice Found.* [hereinafter, "*TEAJF*"], 270 F.3d 180 (5th Cir. 2001). In contrast, the court below considered both whether the Washington State IOLTA program should be analyzed under the *per se* takings approach outlined in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and whether the program could survive scrutiny under the *ad hoc* approach. Pet. App. 27a-32a and 33a-38a. This Court would have the benefit of both analyses if it decides to grant review in this case.

I. The Court Should Grant Review To Resolve the Conflict in the Circuits Over the Constitutionality of IOLTA Programs

Respondents devote much of their opposition briefs to an attack on the Fifth Circuit's decision as inconsistent with this Court's precedents. But as the Petition explained, it is the Ninth Circuit that has been unfaithful to those precedents.

The opposition briefs of LFofW and the Justices are desperate attempts to deny the obvious. In *Phillips*, this Court said:

> We have never held that a physical item is not "property" simply because it lacks a positive economic or market value. . . . While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property. . . . The government may not seize rents received by the owner of a building simply because it can prove that

> the costs incurred in collecting the rents exceed the amount collected.

Phillips, 524 U.S. at 170-171. That, of course, is this case. To be sure, the Court in *Phillips* did not decide the takings issue, but that was because the courts below had not. The principle is unmistakably clear.

Phillips establishes that the interest in these IOLTA accounts is the property of the plaintiff Petitioners. There can be no arguing with that. Second, there can be no arguing that at the end of the day Respondent LFofW had that money in its pocket -- to the tune, it tells us, of $3-$4 million each year. Well, how did it get it? In plain English, they took it.

Respondents make heavy weather of the distinction between *per se* and regulatory takings, as if somehow this helps them escape the obvious conclusion that the government has taken but not paid for something that does not belong to them. In requiring compensation in all such situations, the Court has never noted a distinction between the confiscation of real property and the confiscation of personal property. The Court just last month in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 70 U.S.L.W. 4260, 4265 (2002), explained:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation

> proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. . . .
>
> In a footnote, the Court clarified:
>
> In determining whether government action affecting property is an unconstitutional deprivation of ownership under the Just Compensation Clause, a court must interpret the word, "taken." When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.

Id. at 4265 n.17.

Given the character of the program at issue here, Respondents' suggestion that the IOLTA scheme constitutes a regulation of the interest is utterly unhelpful to them. While Petitioners submit that outright takings of money, like this one, fit easily within the category of *per se* takings, at the end of the day, it should make no difference whether the taking is analyzed under the *per se* or the *Penn Central* test. There is only one Takings Clause. Its core purpose is to foreclose just the sort of random, drive-by seizures of private assets for general governmental purposes as are perpetrated by the Washington IOLTA program. In view of what is at issue, the IOLTA program represents an obvious taking,

whether one evaluates it under a *per se* test, or under the more circuitous, three-factor analysis of the *Penn Central* decision.

Equally convoluted and in the end unavailing is the argument that even if the government did take millions of dollars of interest that belongs to Petitioners and others like them, there can be no relief because perhaps -- and this fact was disputed on summary judgment -- the property had no financial value to them.[2] Putting aside that this argument contradicts the passage from *Phillips* quoted above, it ignores the fact that the money confiscated from Petitioners had an easily ascertainable, positive value. The Fifth Circuit understood this. The Ninth did not.[3]

---

[2] LFofW argues that Petitioners "did not even offer evidence that their funds were deposited at a bank that ceased paying earnings credits to their escrow companies." LFofW Br. 7. That is wrong. The record is undisputed, for example, that the bank into which Petitioner Greg Hayes's funds were deposited ceased paying earnings credits after the IOLTA program was expanded to cover real estate professionals and before Mr. Hayes's funds were deposited. *See* Excerpts of Record 6 (Affidavit of Sharon S. Brinley) at 3.

[3] Respondent LFofW attempts to avoid discussion of the "just compensation" issue by asserting that the Petition does not challenge the Ninth Circuit's holding that Petitioners suffered no loss and thus are not entitled to compensation. LFofW Br. 9, 17. That assertion is demonstrably wrong; two sections of the Petition directly challenge the Ninth Circuit's "no compensable loss" holding. Pet. 18, 22. The first Question Presented explicitly raises the question whether the IOLTA program violates Petitioners' rights under the Takings Clause in such manner "that the property owners are entitled to relief."

Finally, the Justices seek to paint the IOLTA program as a regulatory regime that was expanded to the real estate industry to protect depositors from self-dealing escrow and title companies. Justices Br. 6. There is nothing in the record to support this *post hoc* assertion that the State was "protecting" depositors by confiscating their funds. Indeed, the Washington State Department of Licensing (which regulates escrow companies in the State) has long been aware of, and approves of, the "earnings credits" system that the Justices suddenly found objectionable after this suit was filed.

II. The Court Should Grant Certiorari To Determine the Availability of Equitable Remedies for Takings That Result from the Outright Confiscation of Money

Respondents do not dispute that the Fifth Circuit held -- under facts virtually identically to the facts of this case -- that those challenging IOLTA programs on Takings Clause grounds may seek injunctive and declaratory relief to remedy the constitutional violation. *See, e.g.*, LFofW Br. 10.

Yet, despite the Ninth Circuit's holding that Petitioners are not entitled to equitable relief, Respondents insist that "there is no split in the circuits as to the availability of injunctive relief." LFofW Br. 10. They base that assertion on their claim that the appeals court "only touched on" the question of equitable relief in connection with its ruling that several of the Petitioners lacked standing. *Id.*

Respondents' linguistic contortions are insufficient to overcome the fact that although the Ninth Circuit may have "only touched on" the equitable relief issue, its ruling on that

issue was the "but for" cause of its dismissal of several Petitioners' claims. The sole remedy sought by the Washington Legal Foundation (WLF) in this action is equitable relief on behalf of members whose constitutional rights are threatened by the IOLTA program. The Ninth Circuit held, *sua sponte,* that WLF lacked standing to assert its members' constitutional rights for the *sole* reason that "prospective injunctive relief is an inappropriate remedy here, where the individuals are pursuing their remedy against the state, and the question is whether they are entitled to any remedy for the state regulatory action at issue." Pet. App. 18a.

Similarly, the claims of Petitioner Dennis Daugs would not have been dismissed for lack of standing "but for" the appeals court's finding that he was not entitled to seek equitable relief, the sole form of relief he sought. Respondent LFofW contends that the Ninth Circuit held that Mr. Daugs lacked standing because he has "no cognizable property interests" in the funds he holds for his clients. LFofW Br. 22 n.14. That is not correct. The Ninth Circuit "assum[ed], without deciding," that Mr. Daugs does indeed possess "legal title" to funds held in his escrow account. The appeals court nonetheless held that Mr. Daugs lacks standing because he cannot assert a monetary claim to recover for himself the interest income confiscated by LFofW and because such monetary relief is the only relief available in a Takings Clause case of this type. Pet. App. 13a-14a.

Respondents also assert the absence of a circuit split over the equitable relief issue because the Fifth Circuit ruled as it did only after holding that Texas had waived its objections to injunctive relief. LFofW Br. 10. That is a

mischaracterization of the Fifth Circuit's holding. The Fifth Circuit did indicate that Texas, in prior proceedings, had conceded that it was "subject to" injunctive relief. *TEAJF*, 270 F.3d at 190. But the court did not rest its holding on that concession alone. Rather, it analyzed relevant case law at length and ultimately concluded that the challengers to the Texas IOLTA program were entitled to entry of injunctive and declaratory relief for violation of their Fifth Amendment rights. *Id.* at 190-194. That conclusion is directly contrary to the Ninth Circuit's holding that injunctive relief is unavailable in IOLTA cases, a holding that was the court's sole basis for its *sua sponte* dismissal of several Petitioners for lack of standing.

Respondents also challenge the Fifth Circuit's holding as contrary to this Court's case law. LFofW seeks to distinguish case law relied on by Petitioners on the ground that all of those cases involved claims filed against the federal government. LFofW Br. 22-25. LFofW asserts that a different analysis is required here because of alleged federalism concerns that arise when Takings Clause claimants seek injunctive relief in federal court and the defendant is a "State [that], as here, has waived its sovereign immunity to suits for inverse condemnation in its courts." *Id.* at 23. But that assertion assumes the existence of a non-futile state-law cause of action. In fact, the Ninth Circuit ruled (in the course of rejecting Respondents' claims that the case was not ripe for review) that no such non-futile action was available to Petitioners in state court, Pet. App. 21a, and Respondents have not sought review of that ruling.

LFofW also asserts that injunctive relief cases involving federal defendants are distinguishable because the Court

found that Congress did not intend, once a Takings Clause violation has been established, to permit the uncompensated takings to continue and then to relegate the plaintiff to repeated suits for damages under the Tucker Act. LFofW Br. 22 n.15 (citing *Eastern Enterprises v. Apfel,* 524 U.S. 498, 521 (1998)). But the Court did not base its ruling on any statutory language suggesting that Congress had "withdraw[n] Tucker Act jurisdiction over monetary claims arising under the Coal Act." LfofW Br. 22 n.15. Rather, the Court permitted the petitioner to seek injunctive relief against an alleged federal government Takings Clause violation involving a "direct transfer of funds," because it simply did not believe that Congress would have intended to require "an utterly pointless set of activities": repeated government appropriations of private funds followed by repeated claims for compensation by the owners of those funds. *Eastern Enterprises,* 524 U.S. at 521. The Court reached the same result in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 165-66 (1980), in which it granted declaratory relief against a Florida statute that mandated the confiscation of interest income earned on private funds.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[4] The Justices' brief indicates that their thought processes are similar to those *Eastern Enterprises* ascribed to Congress. The brief indicates that should a judgment be entered that included a finding of a Takings Clause violation, they would discontinue the IOLTA program. Justices Br. 20-21.

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Date: May 20, 2002

(3)

No. 01-1325

Supreme Court, U.S.
FILED
MAY 8 2002
CLERK

IN THE

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v.

LEGAL FOUNDATION OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE*, CITIZENS FOR THE PRESERVATION OF CONSTITUTIONAL RIGHTS, SMALL PROPERTY OWNERS ASSOCIATION, SCOTT SHERMAN, DAVID PARKER, AND KAREN PARKER, REP. FRANCIS L. MARINI SUPPORTING THE PETITION FOR A WRIT OF CERTIORARI

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10 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the *ad hoc* regulatory takings analysis is the appropriate test when government actually transfers ownership of private property rather than merely regulating the use of the property.

Where a state entity creates a mechanism for taking private property, which does not include any process for providing compensation, is injunctive relief an appropriate remedy.

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INTEREST OF THE *AMICI CURIAE*[*]

The *Amici Curiae* are the plaintiffs in the case of *Citizens for the Preservation of Constitutional Rights, et al. v. Chief Justice Marshall, et al.*, No. 02-cv-10125 MLW (D.Mass. filed Jan. 23, 2002), which challenges the constitutionality of the Massachusetts IOLTA program. They are joined by a Massachusetts elected official, who is participating in that case as an *amicus* at the district court. The Massachusetts plaintiffs are all victims of IOLTA's unconstitutional taking of

[*] This brief is filed with the written consent of all parties. Attorneys for the parties took no part in the authoring of this brief, in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

private property and the forced contribution to the political speech of groups with whom they do not agree. Much of the $10,000,000.00 in private money taken by the Massachusetts Supreme Judicial Court through IOLTA annually, goes to hiring lawyers to sue small property owners and to lobby against pro-property owner legislation. Because small property owners regularly utilize the services of attorneys, they are also one of the most frequent contributors (all be it against their will) to IOLTA. Grant recipients, such as Greater Boston Legal Services, which maintains a staff of 68 attorneys, are largely devoted to suing landlords on behalf of tenants. *See* www.gbls.org. ***Therefore, amici are forced to pay for the lawyers who sue them.***

Amicus Citizens for the Preservation of Constitutional Rights (CPCR) is a non-profit law firm located in Boston, Massachusetts.[1] CPCR represents clients who's equal protection, speech, religious or property rights have been violated by government actors. *See* www.JulyFourth.net. CPCR seeks compensatory damages for some of these clients. As a law firm practicing within the Commonwealth of Massachusetts, CPCR maintains an IOLTA account as required by Massachusetts Supreme Judicial Court Rule 3:07, Cannon 9, *Massachusetts Rules of Professional Conduct*, (Mass.R.Prof.C.) Rule 1.15. *See* 431 Mass. 1302 (2000) (publishing SJC Rule 3:07). CPCR's cases are regularly opposed by other non-profit firms, who have the advantage of receiving generous IOLTA grants.

Amicus Small Property Owners Association (SPOA) is an unincorporated association with over 3,000 members. SPOA is based in Cambridge, Massachusetts. The property owners who make up

[1] CPCR is a non-stock, non-profit corporation. It has no parent corporation and no publicly held company owns any of its stock.

this association regularly do business with attorneys in Massachusetts and their funds are regularly placed in IOLTA accounts. SPOA, itself, has engaged the services of attorneys within the Commonwealth and will do so again in the future.

Amicus Scott Sherman is a citizen of the Commonwealth of Massachusetts. In the course of his business dealings, he has in the past engaged the services of attorneys and expects to continue to do so. Currently Mr. Sherman has money held in an IOLTA account. Mr. Sherman has been sued by individuals represented by attorneys funded through IOLTA.

Amici David Parker and Karen Parker are citizens of the Commonwealth of Massachusetts. In the course of their business, they have engaged the services of attorneys and expects to continue to do so. The Parkers have previously had funds placed into IOLTA trust accounts.

These *amici* have all had their property taken by the Massachusetts Supreme Judicial Court without just compensation. They have all been forced to contribute their funds to support the expressive activities of others with whom they do not agree.

The plaintiffs in the Massachusetts IOLTA case are joined in this brief by *Amicus* State Representative Francis L. Marini. Rep. Marini was elected to the Massachusetts House of Representatives in 1994 and was elected Minority Leader on January 6, 1999, and again on January 3, 2001. Rep. Marini is an *amicus* in the Massachusetts IOLTA case. Rep. Marini believes that IOLTA is damaging to the structure of Massachusetts government and intrudes on the powers of the legislature. Rep. Marini is a personal witness to the lobby activity paid for by client funds taken through IOLTA.

SUMMARY OF THE ARGUMENT

The decision of the Fifth and Ninth Circuits need to be reconciled. With IOLTA programs in all 50 states, additional suits like the one brought by the *amici* in Massachusetts are inevitable.

Additionally, the decision of the *en banc* panel of the Ninth Circuit provides this Court with the opportunity to further clarify when the *ad hoc* and *per se* takings analyses are appropriate.

IOLTA is damaging to the fundamental principles that property belongs to the individual, not the state, as well as the principle that the state cannot force individuals to fund political speech or expression that is contrarily to their beliefs. As this Court has long noted, "in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897).

STATEMENT OF THE CASE

Massachusetts, like the other 49 states, has adopted an IOLTA program. The Massachusetts IOLTA program is mandated by the Justices of the Massachusetts Supreme Judicial Court for all attorneys practicing within the Commonwealth. Mass.R.Prof.C. 1.15. Similar to Washington State, the Massachusetts - IOLTA rules require attorneys to maintain a separate pooled account for certain client funds held by that attorney, *i.e.*, those which "are nominal in amount, or are to be held for a short period of time", must be placed in a "pooled account ('IOLTA account')." *Compare*, Washington Disciplinary Rule (Wash. DR) 9-102 and Mass.R.Prof.C. 1.15. The interest income generated by these client funds is turned over to the Court.

As in Washington, the Supreme Judicial Court mandates that, "[l]awyers shall certify their compliance with [the IOLTA] rule" as a prerequisite to practicing within the Commonwealth. Mass.R.Prof.C. 1.15(e)(3).

These funds are the property of the client and are held in trust by their attorney. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998) ("the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal" – the client); *Kent v. Dunham*, 106 Mass. 586, 591 (1871) ("interest follows as an accretion to the principal legacy").

Despite the finding by this Court that the interest income generated by these accounts belongs to the individual clients, the Supreme Judicial Court of Massachusetts continues to take clients' interest income, for its own use, in the amount of over $10,000,000.00 a year.

The money taken in Massachusetts is distributed through a committee created by the Justices of the Supreme Judicial Court, the Massachusetts IOLTA Committee.[2] The funds are distributed to various Recipient Organizations. The Massachusetts IOLTA rules do not prevent these Recipient Organizations from using the funds for lobbying or for the drafting of legislation.

Recipient Organizations regularly utilize IOLTA grants to engage in litigation against the individuals whose funds generated the interest income in the IOLTA accounts. The result is that individuals, like

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[2] The Massachusetts IOLTA Committee utilizes three other organizations to review grant requests: the Massachusetts Bar Foundation, the Boston Bar Foundation and the Massachusetts Legal Assistance Corporation.

the *amici*, are forced to fund litigation against themselves.

ARGUMENT

I. The Conflicting decisions among the Circuits should be resolved.

As the plaintiffs in a challenge to the Massachusetts IOLTA program, the *amici* are confronted with conflicting decisions by the Fifth and Ninth Circuits. The *amici* argue that the logic of the Fifth Circuit should be adopted, while the defendants seek the adoption of the Ninth Circuits' reasoning.

With IOLTA programs in all fifty states taking an estimated $150,000,000.00 per year in clients' interest income, there is little doubt that other courts beyond the Fifth, Ninth, and now First Circuits, will have to address these identical issues.

A. First Conflict: What analysis should courts apply?

One of the first questions that will need to be addressed in the resolution of *amici*'s challenge to the Massachusetts IOLTA program is which form of takings analysis should be applied. The Ninth Circuit chose to apply the *ad hoc* regulatory takings analysis. The Fifth Circuit analyzed the Texas IOLTA program under the *per se* takings analysis. *See Washington Legal Foundation v. Texas Equal Access to Justice Foundation* ["*TEAJF*"], 270 F.3d 180, 186 (5th Cir. 2001), *citing*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See also*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (holding that the *ad hoc* analysis is appropriate when determining if a

regulation of the use of private property goes too far and amounts to a taking, while the *per se* analysis is to be applied to regulations that "compel the property owner to suffer a physical 'invasion' of his property" or "where regulation denies all economically beneficial or productive use of land").

The First Circuit has recently stated its understanding of,

> "the two prongs of takings jurisprudence: *per se* (or categorical) takings and regulatory takings. Government action categorically violates the Takings Clause if it results in the permanent physical occupation of property or if it denies the owner all economically beneficial use of his property. In these instances, known as *per se* takings, just compensation is required, no matter how minor the invasion or how great the public purpose served by the regulation. In contrast, in noncategorical regulatory takings cases, courts must engage in an ad hoc, factual inquiry to determine whether the government regulation goes too far."

Philip Morris, Inc. v. Reilly, 267 F.3d 45, *21-22 (1st Cir. 2001) (internal citations omitted), *reh'g en banc granted*, No. 00-2425 (November 16, 2001), *argued*, January 7, 2002.

In its pre-*Phillips* decision on IOLTA, the First Circuit applied the *per se* analysis to a review of whether the use of client funds held in IOLTA as a mechanism for generating interest income for the state constituted a temporary taking of the principal. *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 975 (1st Cir. 1993). In that case, the First Circuit held that the taking of interest income was not at issue, based on the now indefensible argument that the clients "do not have a

property right to the interest earned on their funds held in IOLTA accounts." *Id.* at 975-76. Based on that erroneous proposition, the only claim reviewed under the *per se* analysis was whether the clients' property right to exclude others from the use of their funds had been violated. *Id.* at 976. In doing so the First Circuit attempt to distinguish this Court's holding in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

> "In *Webb's*, the Court found that the claimants to the interpleaded fund had a recognized property right to the interest earned while the funds were held by the county registries. In this case, the plaintiffs do not have a property right to the interest earned on their funds held in IOLTA accounts . . . The *Webb's* claimants had property rights to accrued interest which is tangible personal property, while plaintiffs in this case have claimed only intangible property interests" – the right to control and exclude others.

Massachusetts Bar Foundation, 993 F.2d at 975-76.

The First Circuit thus implied that if clients had a property right to the interest income generated by IOLTA, then, under the *per se* analysis applied by this Court in *Webb's*, a taking requiring compensation would have occurred. *See Webb's*, 449 U.S. at 163. This would put the First Circuit in conflict with the decision of the *en banc* panel of the Ninth Circuit.

This Court recently stated that the *per se* and *ad hoc* tests are not interchangeable.

> "This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa."

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. __, No. 00-1167, 2002 U.S. LEXIS 3028, *34 (April 23, 2002). *Tahoe-Sierra Pres. Council* makes a clear on the inapplicability of the *per se* analysis in cases involving the regulations of the use of property. This Court should use this opportunity to add an equally clear statement that an *ad hoc* analysis is not appropriate where government has actually appropriated personal property.

B. Second Conflict: What relief will be available to the *amici*?

Another question the Court in Massachusetts will need to answer is: What relief will the *amici* be entitled to, given that the Massachusetts IOLTA program, like those in Texas and Washington, does not contain, "'reasonable, certain and adequate provision for obtaining compensation.'" *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974), *quoting, Cherokee Nation v. S. Kansas R. Co.*, 135 U.S. 641, 659 (1890). In their case, the *amici* are asking for an injunction against the enforcement of the Massachusetts IOLTA program, because it does not include a process by which clients may seek compensation for their private property that has been taken.

When confronted with this question, the Fifth Circuit held that where a governmental policy takes property without providing a mechanism for just compensation, injunctive relief is an appropriate remedy. *TEAJF*, 270 F.3d at 194. The Ninth Circuit rejects the use of such a remedy.

II. How IOLTA funds are used in Massachusetts.

IOLTA requirements came into existence beginning in the 1980s as a mechanism to fund legal services groups. The industry of Legal Services groups funded by IOLTA often target the interests of the very people who unwittingly provide their funding.

- In 1990, IOLTA grant recipient, Massachusetts Law Reform Institute (MLRI), filed a brief with the Supreme Judicial Court advocating in favor of a tax increase. In 1992, MLRI advocated against the repeal of Massachusetts' estate tax. MLRI lobbied against a bill that sought to limit the availability AFDC benefits to teenagers with excessive absences from school. After welfare reforms were enacted, MLRI sent a letter to other non-profit organizations urging them not to participate in workfare.
- In 1989, Grant recipient, Greater Boston Legal Services (GBLS), along with MLRI, brought a case seeking to continue government benefits for illegal aliens.
- Grant recipient Western Massachusetts Legal Services brought an action seeking welfare benefits for a man who won $75,000 in the lottery, then lost the money on a drug and gambling binge. Western Massachusetts Legal Services Corporation published a brochure that advises welfare recipients who inherit or win large amounts of money on how to remain on public assistance. The brochure advised:

> "Since in most cases you want to resume your [welfare] eligibility as soon as possible, you will want to spend the money as quickly as possible . . . You can buy a special gift [or] take a vacation."

- Merrimack Valley Legal Services lobbied against a bill that would removed drug addicts and mental patients from housing for the elderly.

III. Summary

IOLTA remains an unresolved question across the country. The conflicting decision by the only two Courts of Appeal to have reviewed IOLTA in light of this Court's *Philips* decision have not added any clarity to the issue. Unless this Court brings clarity to this issue, further conflicting decision from across the nation are inevitable.

The petition not only provides the Court with ability to resolve the question of IOLTA's constitutionality, granting the petition will also provide the Court with the opportunity to end the confusion, which obviously exists between at least the Fifth and Ninth Circuits, as to when the *per se* and *ad hoc* takings analyses are appropriate.

CONCLUSION

The *Amici Curiae* pray that certiorari will issue.

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No. 01-1325

Supreme Court, U.S.
FILED
APR 30 2002
CLERK

In the

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION; ALLEN D. BROWN; DENNIS H. DAUGS; GREG HAYES; and L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Given that this Court has found the interest on clients' funds held in so-called IOLTA accounts (Interest on Lawyers' Trust Accounts) to be the property of the clients, does a regulatory scheme for funding state legal services by systematically confiscating this property violate the Fifth Amendment by imposing a categorical taking that is analogous to a physical invasion of private property, and by depriving the property owner of his right to exclude government from the uncompensated use of his private property?

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INTEREST OF AMICUS CURIAE

Amicus files this brief to assist in the consideration of important constitutional issues of property rights that are presented by this case. Pacific Legal Foundation (PLF) is a nonprofit organization headquartered in Sacramento, California, with an institutional commitment to a robust enforcement of the Fifth Amendment. For more than two decades PLF attorneys have been championing property rights in this Court. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[1]

WHY THE WRIT SHOULD BE GRANTED

IN UPHOLDING A MANDATORY IOLTA PROGRAM, THE NINTH CIRCUIT CONTRADICTS THE RATIONALE THAT THIS COURT HAS EMPLOYED IN IDENTIFYING UNCONSTITUTIONAL PHYSICAL INVASIONS OF PRIVATE PROPERTY AND ILLEGAL INFRINGEMENTS ON THE RIGHT TO EXCLUDE

The Washington program at issue requires attorneys to deposit client funds that are nominal in amount into a pooled account whose interest is confiscated by the state. Petition for certiorari (Petition), Statement of the Case, at 2-6. As the Petition, at 7, notes, in upholding this IOLTA program the Ninth Circuit candidly admits that it diverges from the analysis employed by the Fifth Circuit when it found a similar program to be an unconstitutional taking. *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 857 (9th Cir. 2001). Moreover, the ruling contradicts this Court's teaching

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

that the uncompensated seizure of private property is a taking regardless of the property's intrinsic value. Petition at 19-20 (citing *Phillips v. Washington Legal Foundation*, 521 U.S. 1117 (1997), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The decision is also at odds with this Court's rulings that under certain circumstances equitable relief is available in the area of takings law. Petition at 26 (citing *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641, 659 (1890), and *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978)).

In addition to these clear conflicts delineated in the Petition, Amicus wishes to draw attention to the contradiction between the ruling below and the rationale that has been employed by this Court in identifying physical invasions of private property and unconstitutional infringements on the right to exclude.

A. The Ruling Below Conflicts with This Court's *Loretto* Precedent, Which Is Applicable by Analogy to Show That the IOLTA Program Works an Unconstitutional Categorical Taking

This Court found a categorical taking where an ordinance required landlords to allow installation of cable TV in their apartment buildings, because the requirement amounted to "a permanent physical occupation authorized by government." *Loretto*, 458 U.S. at 426. The IOLTA program obviously does not invade real property; but it does authorize total state control over a private party's accrued earnings on a bank deposit—earnings that this Court has declared to be private property. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998). The rationale that this Court employed in finding a categorical taking by physical occupation in *Loretto* is equally applicable to the confiscation imposed by the IOLTA program. In *Loretto*, this Court found the following factors to be red flags signaling a physical occupation in violation of the Fifth Amendment:

> First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. . . .

> Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property . . . . Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Loretto, 458 U.S. at 435-36 (citations omitted).

A commentator who has examined IOLTA programs, such as the case at bar, that confiscate clients' interest earnings, notes that *Loretto* "found the basis for its strict physical occupation takings standard in the extent to which occupation interfered with traditional property rights," and

> [m]andatory IOLTA programs interfere with the traditional property rights of clients to the same degree as a physical invasion. Specifically, when compelled to participate in the program, clients cannot assert possession over the interest generated from their principal, cannot control those funds, and are prevented from excluding the state from IOLTA interest. Accordingly, their ability to sell or devise their rights in IOLTA-generated interest is devoid of value. In sum, the government maintains complete control over the interest generated in IOLTA programs.

J. David Breemer, *IOLTA in the New Millennium: Slowly Sinking Under the Weight of the Takings Clause*, 23 U. Haw. L. Rev. 221, 235-36 (2000).

In other words, the extent of the confiscation inflicted by IOLTA is comparable in a crucial sense to the infringement in *Loretto*. Analogizing between confiscation that amounts to a categorical taking (as in this case) and a physical occupation that also amounts to a categorical taking (as in *Loretto*) is a simple recognition that in both scenarios the owner's rights in

the property have been categorically denied. "As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, *physical invasion, or regulation*," a taking in the Fifth Amendment sense has occurred. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) (emphasis added).

The analogy between confiscation (as in this case) and occupation (as in *Loretto*) is rooted in the understanding that the Takings Clause protects the right to make use of what one owns. This Court has frequently observed that government actions that preclude an owner from making economically beneficial use of his property violate the Fifth Amendment. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)) (the Fifth Amendment is violated by regulations that deny an owner economically viable use of his property). The IOLTA program appropriates to the state the beneficial use of depositers' private property—i.e., their accrued interest that is confiscated by the program. This infringement is comparable to a physical occupation in the sense that there is a categorical deprivation of the property owner's rights.

The ruling below thus conflicts with this Court's finding of a categorical taking in *Loretto*. Hence, this case is appropriate for a grant of certiorari pursuant to Supreme Court Rule 10(c).

B. The Decision Below Conflicts with Rulings of This Court That Forbid Uncompensated Physical Invasions, Because the IOLTA Program Invades a Definable Property Interest

As the foregoing section notes, this Court's rationale for finding a physical invasion in *Loretto* is applicable by analogy to the case at bar. But the *Loretto* prohibition on government invasion of private property—and other rulings to the same effect—are also applicable by more than analogy. A very real invasion is imposed by IOLTA, and the Ninth Circuit's refusal to recognize that fact is at odds with this Court's precedents. Even though a private party's money cannot be invaded in the

precise way that real property was occupied in *Loretto*, the term "invasion" is just as appropriate where private funds are commandeered, as happens under IOLTA. "Invade" is defined as "2: encroach, intrude or trespass upon," *Webster's Third New International Dictionary*, 1188 (1993). An invasion can be inflicted not only against real property, but against intangibles (e.g., The National Government "will partake sufficiently of the spirit [of the States], to be disinclined to *invade the rights* of the individual States, or the prerogatives of their governments." The Federalist No. 46, at 240 (James Madison) (Bantam Classic ed., 1982) (emphasis added)). IOLTA works an invasion of private property by categorically depriving the owner of the beneficial use of that property, as explained in the foregoing section.

This Court's logic in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), confirms that a mandatory IOLTA program such as the one at bar works an unconstitutional permanent invasion of private property. *Webb's* found unconstitutional a court's refusal to distribute to clients interest from their deposits held in a court registry in connection with an insolvency proceeding. *Id.* at 164. This Court found the appropriation of accrued interest invalid under a per se takings analysis—to be specific, a physical invasion theory.[2] Significantly, this Court found the

> appropriation of the beneficial use of the [accrued interest] analogous to . . . *United States v. Causby*, 328 U.S. 256 (1946). There the Court found a "taking" in the Government's use of air space above the claimant's land as part of the flight pattern for military aircraft, thus destroying the use of the land as a chicken farm. Causby emphasized that

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[2] Likewise, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. ____ (2002), this Court found that categorical takings occur when there are "acquisitions of property for public use" and there is a "'classic taking' . . . [when] the government directly appropriates private property for its own use.'" *Id.* at 19, 20 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998)).

> Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 128, quoting from *Causby*, 328 U.S., at 262-63, n.7.

Webb's Fabulous Pharmacies, 449 U.S. at 164.

"*Causby* is . . . a quintessential physical occupation case, a fact which the Court later recognized in *Loretto*." Breemer, *supra,* at 240 (citations omitted). In other words, by drawing an analogy with *Causby*, this Court signaled that it found that the appropriation of accrued interest in *Webb's* worked an *unconstitutional invasion of private property.* Therefore, the case at hand, which also involves the appropriation of private property in the form of accrued interest, likewise amounts to an unconstitutional invasion of a definable private property interest. The Ninth Circuit's decision is at odds with this Court's prohibition on such invasions in *Causby*, *Webb's*, and *Loretto*. Hence, this case is appropriate for a grant of certiorari pursuant to Supreme Court Rule 10(c).

C. The Ruling Below Conflicts with This Court's Precedents That Affirm a Property Owner's Fundamental Right to Exclude, and in So Doing the Ruling Below Raises Collateral Threats to Constitutional Rights

Property is that "dominion one man claims and exercises over the external things of the world, *in total exclusion of the right of any other individual . . . .* " 2 William Blackstone, Commentaries *2 (emphasis added). Indeed, this Court has described the right to exclude as "[t]he hallmark of a protected property interest." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 673 (1999). Nor is this right present only with *real* property. In *K mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 185-86 (1988), for instance, this Court asserted that private rights conferred by trademark law "are . . . rights of exclusion." When a state, by law, appropriates to itself the beneficial use of private property, it has abridged the owner's fundamental right to exclude. *See Presault v. Interstate Commerce Commission*, 494 U.S. 1, 24-

25 (1990) (O'Connor, J., concurring) (government's burdening of property in a way that interferes with the right to exclude implicates the Fifth Amendment).

Holders of deposits under the IOLTA program cannot exclude government from commandeering their accrued interest—their private property—for government's own purposes. They have thus been deprived of a right "universally held to be a fundamental element" of private property—a right that cannot be abridged by government without implicating the Fifth Amendment. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979).

Curtailing the right to exclude vitiates other constitutional rights. Indeed, the interconnection between the right to exclude and other basic freedoms offers a concrete illustration of a truth articulated by Justice Stewart:

> The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . [A] fundamental interdependence exists between the personal right to liberty and the personal right in property.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

As one example, a party's First Amendment rights are imperiled when the party's right to exclude is denied. Private property protects its owners from being forced to contribute to the dissemination of opinions not their own. Private property "not only sustains political participation, but also the conscious choice to be insulated from politics." Douglas W. Kmiec, *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 Vand. L. Rev. 737, 759 (1999). If a property owner does not wish to endorse a particular message, his decision to exclude his property from use in a way that would support that message is itself a form of protected speech. This Court has recognized "the choice of a speaker not to propound a particular point of view," and has held that such a choice "is presumed to lie beyond government's power to control." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575

(1995). Although only the Fifth Amendment is directly at issue in the questions presented in this case, the indirect implications for other constitutional rights strengthens the argument for this Court to take review. If one cannot consciously decline to use one's property to host or subsidize a message, the absence of a right to exclude has negated the property owner's right to speak.

Because the decision below conflicts with this Court's consistent insistence that the right to exclude is a fundamental element of the property right, this case is appropriate for a grant of certiorari pursuant to Supreme Court Rule 10(c).

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court grant the petition and reverse a ruling clearly in conflict with this Court's takings precedents.

DATED: April 26, 2002.

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Supreme Court, U.S.
FILED
AUG 22 2002
OFFICE OF THE CLERK

No. 01-1325

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LEGAL FOUNDATION OF WASHINGTON, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Certiorari Filed: March 7, 2002
Certiorari Granted: June 10, 2002

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United States District Court
U.S. District Court -- Western Washington (Seattle)

DOCKET FOR CASE #: 97-CV-146

WASHINGTON LEGAL FOUNDATION, et al.

v.

LEGAL FOUNDATION OF WASHINGTON, et al.

SELECTED DISTRICT COURT DOCKET ENTRIES

1/29/97	1	COMPLAINT (Summons(es) issued) Receipt # 238311 (pm) [Entry date 01/31/97]
2/7/97	4	AMENDED COMPLAINT [1-1] by plaintiff WA Legal Foundation, plaintiff Allen D Brown, plaintiff Dennis H Daugs, plaintiff Greg Hayes, plaintiff L Dian Maxwell; terminating Pla Mark Goldberg (jg) [Entry date 02/11/97]
2/20/97	8	MINUTE ORDER: by Judge Thomas S. Zilly. Honorable Thomas S Zilly RECUSES himself & the case is REASSIGNED to Honorable William L Dwyer. All future pleadings shall be filed under cause number C97-146WD.(cc: counsel, Judge, WLD, E.S., M.R., C.C.) (jg) [Entry date 02/21/97]
2/25/97	12	MINUTE ORDER: by Judge William L. Dwyer Case reassigned to Judge John C.

Coughenour (cc: counsel, Judges, JPM, Intake) (ws) [Edit date 02/25/97]

3/3/97 13 ANSWER to complaint [4-1] by defendant Legal Foundation WA, defendant Kevin F Kelly (gm) [Entry date 03/05/97]

3/10/97 19 ANSWER to amended complaint [4-1] by Supreme Court defts (gm) [Entry date 03/13/97]

5/15/97 28 STIPULATION for Dismissal of deft Justice Richard B. Sanders (gm) [Entry date 05/20/97]

5/19/97 27 STIPULATION and ORDER by Judge John C. Coughenour: dismissing defendant Richard B Sanders w/prejudice (cc: counsel, Judge) (rs)

5/22/97 29 MINUTES/STATUS CONFERENCE: JCC; Dep Clerk: J. Mahnke; CR: Joe Roth; Cnsl present: James Purcell/ Richard Samp/ Maureen Hart/William Gellert. Status Conference called, cnsl advise the Court of status. Opening motions are to be filed by 10/1/97. Cnsl are to file aresponsive briefs in accordance w/ the Local Rules. File Review set for 11/13/97. (gm) [Entry date 05/23/97]

11/5/97 38 MOTION by defendant Philip A Talmadge, defendant Charles Z Smith, defendant Barbara A Madsen, defendant Charles W

Johnson, defendant Richard P Guy, defendant James M Dolliver, defendant Gerry L Alexander, defendant Barbara Durham for summary judgment; OA REQ'D NOTED FOR 11/28/97 (gm)

11/5/97 41 MOTION by plaintiff L Dian Maxwell, plaintiff Greg Hayes, plaintiff Dennis H Daugs, plaintiff Allen D Brown, plaintiff WA Legal Foundation for summary judgment; OA REQ'D NOTED FOR 11/28/97 (gm)

11/5/97 53 MOTION by defendant Legal Foundation WA for summary judgment; OA REQ'D NOTED FOR 12/5/97 (gm) [Entry date 11/06/97]

12/1/97 58 RESPONSE by plaintiff to defts LFofW and Kelly's motion for summary judgment [53-1] (gm)

12/1/97 59 RESPONSE by plaintiffs to Supreme Court of WA's motion for summary judgment [38-1] (gm)

12/1/97 60 BRIEF OF Supreme Court Opposing Pltfs Motion for Summary Judgment motion [41-1] (gm) [Entry date 12/02/97]

12/1/97 62 OPPOSITION (RESPONSE by defendant Legal Foundation WA to motion for summary judgment [41-1] (gm) [Entry date 12/02/97]

12/4/97 64 REPLY by plaintiffs TO RESPONSE to motion for summary judgment; OA REQ'D [41-1] (kerr)

12/4/97 65 REPLY BRIEF by defendants IN SUPPORT of Supreme Court of Washington's motion for summary judgment [38-1] (gm) [Entry date 12/08/97]

12/4/97 66 REPLY MEMORANDUM by defendant Kevin F Kelly, defendant Legal Foundation WA IN SUPPORT OF motion for summary judgment [53-1] (gm) [Entry date 12/08/97]

1/30/98 70 ORDER by Judge John C. Coughenour: LFW Defts motion for summary judgment and the Supreme Court of WA's motion for summary judgment are GRANTED. Pltfs motion for summary judgment is DENIED. [41-1], [38-1], [53-1] (cc: counsel, Judge) (gm)

1/30/98 71 MINUTES: Oral Argument: JCC; Dep Clerk: J. Mahnke; CR: Joe Roth;Cnsl present: Richard Samp/David Burman/ Maureen Hart. Called, cnsl heard. The Court will issue a written decision. (gm)

1/30/98 72 JUDGMENT: DECISION BY THE COURT: IT IS ORDERED AND ADJUGED LFW Defendants Motion for Summary Judgment and the Supreme Court of Washington's Motion for Summary Judgment are GRANTED. Plaintiffs Motin

for Summary Judgment is DENIED. (cc: all counsel, JCC.Jgmbk) Judge, Jgm. Book) Entered on: 1/30/98 (gm)

2/7/98 73 NOTICE OF APPEAL by plaintiffs Greg Hayes, Dennis H Daugs, Allen D Brown, WA Legal Foundation from Dist. Court decision [72-1] (cc: CCA, Judge, counsel) (ss) [Entry date 02/11/98]

4/6/98 -- CERTIFICATE OF RECORD Transmitted to USCA [98-35154] (cc: all counsel) (ss) [Entry date 04/07/98]

12/28/99 -- CLERK'S RECORD ON APPEAL transmitted to Circuit (2 volumes) (kn)

12/10/01 80 MANDATE (98=35154) from Circuit Court of Appeals AFFIRMING IN PART, VACATING IN PART, and REMANDING IN PART the decision of the District Court, each party shall bear its own costs of appeal. [73-1] (cc: all counsel, JCC, jgm bk) (sa)

6/19/02 84 ORDER REMOVING CASE FROM ACTIVE CASELOAD by Chief Judge John C. Coughenour (cc: counsel, Judge, JM) (mh) [Entry date 06/21/02]

US Court of Appeals for the Ninth Circuit
Court of Appeals Docket #: 98-35154

WASHINGTON LEGAL FOUNDATION, et al.

v.

LEGAL FOUNDATION OF WASHINGTON, et al.

SELECTED COURT OF APPEALS DOCKET ENTRIES

2/18/98	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is past due; CADS must be filed no later than 2/25/98; appellant's designation of RT is due 2/17/98; appellee's designation of RT is due 2/27/98; appellant shall order transcript by 3/9/98; court reporter shall file transcript in DC by 4/9/98; certificate of record shall be filed by 4/16/98; appellant's opening brief is due 5/26/98; appellees' brief is due 6/25/98; appellants' reply brief is due 7/9/98; [98-35154] (mhf)
2/23/98	Filed atty Richard A. Samp for Appellants Washington Legal et al. Civil Appeals Docketing Statement served on 2/18/98 (to CONFATT) [98-35154] [98-35154] (sa)
4/8/98	Filed order CONFATT (CG) Case selected for Pre-Briefing Conference program. The

	briefing sched previously established is vacated. Appellants' brief, excerpts of record are due 7/29/98; appellees' brief due 8/28/98; appellants' reply brief due w/in 14 days of service of aples brief; The conf set for 4/21/98 is cancelled. [98-35154] (jmk)
4/14/98	Filed certificate of record on appeal RT filed in DC 4/1/98 [98-35154] (sa)
7/1/98	Filed order CONFATT (cg) releasing case from CONFATT; prev briefing schedule remains in effect... the clk may consider the prev modification of brf sched to be aplts' first ext of time which would preclude an oral req for ext of time... [98-35154] (sa)
8/4/98	Filed original and 15 copies Appellants' Washington Legal, Allen D. Brown, Dennis H. Daugs, Greg Hayes, and L. Dian Maxwell opening brief (Informal: no) 51 pages and five excerpts of record in 01 volume, served on 7/29/98 [98-35154] (ot)
9/11/98	Filed original and 15 copies amici Alaska Bar Found'n, Arizona Bar Found'n, Hawaii Justice, Montana Law Found., Nevada Law Found., and Oregon Law Found.'s amicus brief of 15 pages (w/ consents) in spt of aples; served on 9/11/98 [98-35154] (sa)
9/14/98	Filed original and 15 copies appellees Barbara Durham, et al. (Justices of the State of Washington Supreme Court) 26 page

brief, five sets Supp. Exc. in one volume; served on 9/10/98 [98-35154] (sa)

9/14/98 Filed original and 15 copies American Bar Assn.'s amicus brief of 45 pages (w/ consents); served on 9/11/98 [98-35154] (sa)

9/14/98 Filed original and 15 copies Natl Assoc of IOLTA's brief of 30 pages (w/ consents) in spt of aples; served on 9/10/98 [98-35154] (sa)

9/14/98 Filed original and 15 copies WA State Bar Assoc.'s amicus brief of 23 pages (w/ consents) in spt of aples; served on 9/11/98 [98-35154] (sa)

9/15/98 Filed original and 15 copies appellee Legal Foundation of Washington and Bradley C. Diggs' 51 page answering brief; served on 9/11/98 [98-35154] (sa)

10/19/98 Filed original and 15 copies Washington Legal, Allen D. Brown, Dennis H. Daugs, Greg Hayes and L. Dian Maxwell's reply brief, (Informal: n) 39 pages; served on 10/13/98 [98-35154] (sm)

12/7/99 CALENDARED: Seattle Feb 9 2000 9:00 a.m. Courtroom at Park Place, 21st Floor [98-35154] (th)

12/28/99 FILED CERTIFIED RECORD ON

APPEAL IN 2 VOLS.(TOTAL): 2 CLERKS REC (Orig) [98-35154] (jmk)

2/9/00 ARGUED AND SUBMITTED TO Stephen S. TROTT, Andrew J. KLEINFELD, Barry G. SILVERMAN [98-35154] (jmk)

1/10/01 FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Stephen S. TROTT; Andrew J. KLEINFELD, author; Barry G. SILVERMAN.) FILED AND ENTERED JUDGMENT. [98-35154] (crw)

1/31/01 [4086291] Filed original and 50 copies Aples petition for rehearing with suggestion for rehearing en banc 15 pages, served on 1/30/01 PANEL AND ALL ACTIVE JUDGES [98-35154] (crw)

2/12/01 Filed order (Stephen S. TROTT, Andrew J. KLEINFELD, Barry G. SILVERMAN): Aplts are ordered to file a response to aples petn for rhrg/en banc filed with this court on 1/31/01. The resp shall not exceed 15 pages and shall be filed within 21 days of the date of this order. 50 copies of the resp should be filed with the ct. [98-35154] (crw)

3/5/01 Filed Aplts response to petition opposing petition for enbanc rehearing [4086291-1] served on 3/2/01 PANEL AND ALL

ACTIVE JUDGES [98-35154] (crw)

5/9/01 Filed for publication order (Mary M. SCHROEDER): Upon the vote of a majority of nonrecused regular active judges of this court, it is orderd that this case be reheard by the en banc court pursuant to CR 35-3. The three-judge panel opn shall not be cited as precedent by or to this court or any dc of the 9th Cir, except to the extent adopted by the en banc court. [98-35154] (crw)

5/10/01 Filed order (Mary M. SCHROEDER): Oral arg in the above case shall be reheard en banc in SF on 6/21/01 at 2pm. [98-35154] (crw)

5/10/01 CALENDARED: SAN FRAN Jun 21 2001 2:00 pm Courtroom 4 [98-35154] (aw)

6/21/01 ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Harry PREGERSON, Alex KOZINSKI, Stephen S. TROTT, Andrew J. Kleinfeld, A. W. TASHIMA, Barry G. SILVERMAN, Kim M. WARDLAW, Raymond C. FISHER, Marsha S. BERZON, Johnnie B. RAWLINSON [98-35154] (tu)

11/14/01 FILED OPINION: AFFIRMED IN PART, VACATED IN PART, AND REMANDED. Each party shall bear its own costs of appeal. (Terminated on the Merits after

Oral Hearing; Affirmed; Written, Signed, Published. Heard en banc; Mary M. SCHROEDER; Harry PREGERSON; Alex KOZINSKI, dissenting; Stephen S. TROTT, dissenting; Andrew J. KLEINFELD, dissenting; A. W. TASHIMA; Barry G. SILVERMAN, dissenting; Kim M. WARDLAW, author; Raymond C. FISHER; Marsha S. BERZON; Johnnie B. RAWLINSON.) FILED AND ENTERED JUDGMENT. [98-35154] (crw)

12/6/01 MANDATE ISSUED [98-35154] (crw)

3/18/02 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 01-1325 filed on 3/7/02. [98-35154] (crw)

6/14/02 Filed Supreme Court order, certiorari denied on 6/10/02. Supreme Court No. 01-1325 [98-35154] (crw)

United States District Court
for the Western District of Washington

Washington Legal Found. v. Legal Found. of WA
No. 97-CV-146

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action by a public interest law firm and four citizens of the State of Washington to enjoin state officials from continuing to require Limited Practice Officers ("LPOs") to deposit trust funds into Washington's IOLTA ("Interest on Lawyers' Trust Accounts") program.

2. Under the IOLTA program, Washington officials compel both LPOs and attorneys under certain circumstances to forward to a state-controlled entity interest earned on funds being held in trust for their clients.

3. Each of the Plaintiffs objects to this compelled taking and use of IOLTA trust accounts, in violation of their rights under the U.S. Constitution as guaranteed by the First and Fifth Amendments.

Jurisdiction

4. The Court has jurisdiction over this action under 28 U.S.C. § 1331, in that the action arises under the Constitution of the United States; and under 28 U.S.C. § 1343, in that the action seeks redress of the deprivation, under color of state law, of rights secured by the Constitution. Plaintiffs' rights to judicial review of the actions complained of are secured by 42 U.S.C. § 1983.

Parties

5. Plaintiff WASHINGTON LEGAL FOUNDATION (WLF) is a nonprofit public interest law and policy center with members and supporters nationwide, including many within the State of Washington. It devotes a substantial portion of its resources to protecting the speech and property rights of individuals from undue government interference. Among WLF's members are citizens of Washington who object to having their money used to support the Washington IOLTA program, and LPOs in Washington who object to being forced to place client trust funds into IOLTA accounts.

6. Plaintiff ALLEN D. BROWN is a citizen of Washington. In the course of his business dealings, BROWN has regularly purchased and sold real estate located in the State of Washington, and he expects to continue to do so. A standard procedure in Washington real estate transactions entails the purchaser, pursuant to a purchase and sale agreement and prior to closing, placing funds in trust with a closing agent hired by the parties to facilitate the sale; the agent holds the trust funds until the sale transaction is closed. BROWN has regularly deposited trust funds with closing agents in the past, and he expects to continue to do so. BROWN has been informed by the agents with whom he regularly deals that, pursuant to changes in the IOLTA program adopted by the Washington Supreme Court in September 1995, they are required to place his trust funds into an IOLTA account.

7. GREG HAYES is a citizen of Washington. In the course of his business dealings, HAYES has purchased real estate located in the State of Washington, and he expects to continue to do so. In connection with those real estate transactions, HAYES has deposited trust funds with closing

agents in the past, and he expects to continue to do so. HAYES has been informed by the agents with whom he deals that, pursuant to changes in the IOLTA program adopted by the Washington Supreme Court in September 1995, they are required to place his trust funds into an IOLTA account.

8. L. DIAN MAXWELL is a citizen of Washington. She is employed by Pacific Northwest Title Company of Washington, Inc. ("PNW Title," formerly known as Stewart Title Company of Washington, Inc.), a company that provides escrow services to buyers and sellers in connection with real estate transactions. Incidental to her job responsibilities, MAXWELL has selected and filled in blanks of pre-approved form legal documents necessary to effectuate the transfer of title to real estate from a seller to a purchaser; MAXWELL has been authorized to select and fill in such documents by virtue of being licensed as an LPO by the Washington Supreme Court. Although the selection and filling in of form legal documents is a necessary component of the real estate closing process, those activities in fact constitute a negligible portion of the time that MAXWELL has spent on behalf of her escrow customers. She estimates that no more than 1 to 2 percent of her time has been devoted to those activities.

9. Pursuant to changes in the IOLTA program adopted by the Washington Supreme Court in September 1995, in any real estate transaction in which an LPO performs services, the LPO must ensure that funds placed in trust in connection with the transaction are deposited in an IOLTA account. MAXWELL was recently informed by PNW Title that it did not wish to subject itself to the September 1995 change in the IOLTA program because it believed that doing so would be contrary to the best interests of its customers. Thus, PNW Title informed MAXWELL that, if she wished to continue to

be employed by PNW Title, she would be required to surrender her license as an LPO. Recognizing that there were extremely few positions comparable to hers within the escrow industry, MAXWELL responded by surrendering her LPO license on November 27, 1996. As a result, MAXWELL is no longer permitted to practice her profession fully, and to select and fill in the legal documents that she is fully qualified to select and fill in.

10. Plaintiff DENNIS H. DAUGS is a citizen of Washington. DAUGS's business entails providing escrow services to buyers and sellers in connection with real estate transactions. Incidental to the service provided to his clients, DAUGS has selected and filled in the blanks of form legal documents necessary to effectuate the transfer of title of real estate from a seller to a purchaser; DAUGS is authorized to select and fill in such documents by virtue of being licensed as an LPO by the Washington Supreme Court. Although the selection and filling in of form legal documents is a necessary component of the real estate closing process, those activities in fact constitute a negligible portion of the time that DAUGS has spent on behalf of his escrow customers. He estimates that no more than 1 to 2 percent of his time has been devoted to those activities.

11. DAUGS has concluded that, although the Washington Supreme Court's revised IOLTA rules require that client trust funds held by him be deposited in an IOLTA account, doing so would be contrary to the best interests of his clients. DAUGS is suing on behalf of himself and in his fiduciary capacity as trustee on behalf of his clients whose funds, according to the revised IOLTA rules, must be placed into an IOLTA account.

12. Defendant LEGAL FOUNDATION of WASHINGTON (LFofW) is a nonprofit corporation

established under the direction of the Washington Supreme Court. Pursuant to rules established by the Washington Supreme Court, all interest earned on IOLTA accounts is forwarded to LFofW, which in turn distributes the funds to other entities in accordance with rules established by the Supreme Court of Washington.

13. Defendant KEVIN F. KELLY is President of LFofW. KELLY is being sued in his official capacity.

14. Defendant BARBARA DURHAM is Chief Justice of the Washington Supreme Court, the government body at whose direction the Washington IOLTA program was established. DURHAM is being sued in her official capacity.

15. Defendant GERRY L. ALEXANDER is a Justice of the Washington Supreme Court. ALEXANDER is being sued in his official capacity.

16. Defendant JAMES M. DOLLIVER is a Justice of the Washington Supreme Court. DOLLIVER is being sued in his official capacity.

17. Defendant RICHARD P. GUY is a Justice of the Washington Supreme Court. GUY is being sued in his official capacity.

18. Defendant CHARLES W. JOHNSON is a Justice of the Washington Supreme Court. JOHNSON is being sued in his official capacity.

19. Defendant BARBARA A. MADSEN is a Justice of the Washington Supreme Court. MADSEN is being sued in her official capacity.

20. Defendant RICHARD B. SANDERS is a Justice of the Washington Supreme Court. SANDERS is being sued in his official capacity.

21. Defendant CHARLES Z. SMITH is a Justice of the Washington Supreme Court. SMITH is being sued in his official capacity.

22. Defendant PHILIP A. TALMADGE is a Justice of the Washington Supreme Court. TALMADGE is being sued in his official capacity.

Statement of the Claim
Creation of the IOLTA Program

23. On June 19, 1984, the Washington Supreme Court adopted an order establishing the Washington Interest on Lawyers Trust Accounts program (the "IOLTA Program"). Pursuant to that order, the Court incorporated and established a nonprofit corporation known as the LEGAL FOUNDATION of WASHINGTON, with Articles of Incorporation and Bylaws promulgated by the Court.

24. The order also amended Disciplinary Rule ("DR") 9-102 of the Washington Code of Professional Responsibility ("CPR"), which imposed obligations on Washington attorneys regarding "Preserving Identity of Funds and Property of a Client." The amendment provided that an attorney receiving client funds that were "nominal in amount" or were "expected to be held for a short period of time" must create an unsegregated interest- bearing trust account (an "IOLTA account") and direct the depository institution to pay interest earned on the account to the LFofW. CPR DR 9-102(C)(1) and (4). The amendment further provided that all client funds were to be placed into the IOLTA account unless they were deposited in another interest-bearing account that resulted in the creation of "a positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). DR 9-102(C)(3).

25. Pursuant to the Washington Supreme Court's order as amended, the IOLTA Program became effective March 1, 1985.

26. The Washington Supreme Court subsequently repealed the Code of Professional Responsibility and replaced it with the Rules of Professional Conduct ("RPC"), a similar set of rules designed to regulate the conduct of Washington attorneys. The provisions of CPR DR 9-102 were incorporated into RPC 1.14. A copy of the most recent version of RPC 1.14 is attached hereto as Exhibit A.

27. Prior to adoption of the IOLTA Program, Washington banks and other financial institutions (hereinafter, "banks") generally did not pay interest on trust accounts maintained by attorneys and others. However, they did provide a variety of accounting services free of charge, and those services directly benefited those whose funds were being held in the trust accounts.

28. Following adoption of the IOLTA Program, many banks began charging for such accounting services, and deducting the cost of those services from the interest earned on IOLTA accounts prior to forwarding interest to the LFofW.

29. In response to a request by the LFofW, the Washington Supreme Court in 1988 and 1989 amended RPC 1.14 to make clear that banks would no longer be permitted to deduct the cost of accounting services from the interest on IOLTA accounts otherwise payable to the LFofW. As amended, RPC 1.14 limits bank charges on IOLTA accounts to the following: "items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge." RPC 1.14(c)(1).

30. At present, Washington banks generally do not provide accounting services free of charge on IOLTA accounts.

Limited Practice Officers

31. Both before and after 1983, many real estate transactions in Washington have been consummated without the assistance of attorneys. In those cases, legal documents used to complete the transactions have been selected by trained laypersons familiar with the legal requirements of such transactions.

32. In the past and again in the early 1980s, a controversy arose regarding whether such laypersons were engaged in the unauthorized practice of law.

33. The Washington Supreme Court attempted to settle that controversy in 1983 by adopting Admission to Practice Rule ("APR") 12. APR 12 established a procedure whereby nonlawyers could be licensed to select appropriate legal documents for use in real estate settlements. APR 12 established a Limited Practice Board with the responsibility for licensing such LPOs (Limited Practice Officers, also known as Certified Closing Officers).

34. In June 1993, the Board of Governors of the Washington State Bar Association ("WSBA"), at the request of the WSBA Legal Aid Committee and with the support of the LFofW, petitioned the Washington Supreme Court to amend APR 12 to require that trust funds held by LPOs be made a part of the IOLTA Program. The Court conducted oral arguments on the petition on September 20, 1994.

35. Proponents of the amendment explicitly argued that the amendment was necessary in order to "level the playing field" between escrow attorneys and escrow companies that operated without attorneys; they argued that escrow companies were able to offer lower-priced services because (unlike escrow attorneys) escrow companies were able to obtain free accounting services from banks in return for using non-interest-bearing trust accounts. *See, e.g.*, LFofW's Brief to Washington Supreme Court dated February 1, 1994, at 36.

36. On September 21, 1995, the Washington Supreme Court adopted a new APR 12(h) and 12.1 in order to make LPOs subject to the IOLTA Program. APR 12(h) and 12.1 make clear that LPOs' obligations to maintain and use IOLTA accounts are identical to attorneys' IOLTA obligations. Copies of APR 12(h) and 12.1 are attached hereto as Exhibit B.

37. APR 12(h) provides that LPOs must comply with APR 12.1. APR 12.1 in turn provides that all funds received in connection with a transaction being closed by an LPO must be placed in an interest-bearing account. The interest-bearing account must be an IOLTA account (with interest payable to the LFofW), except that the funds may be placed in a non-IOLTA interest-bearing account if and only if doing so results in the creation of "a positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). APR 12.1(c)(2) and (3). In determining the net interest to be forwarded to the LFofW from IOLTA accounts established by LPOs, banks may deduct from gross interest the following charges only: items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge. APR 12.1(c)(1).

38. APR 12.1 and APR 12(h) became effective December 9, 1995. However, confusion regarding the meaning of the new requirements delayed considerably compliance with the new rule by the escrow industry. Opponents of the new rule pointed out that LPOs often do not control escrow funds being held in connection with the transaction they are closing, and that state regulations governing the escrow industry required that trust funds be held in non-interest-bearing accounts. *See* WAC 308-128E-011(1). The Washington State Department of Financial Institutions responded by adopting a new regulation on

November 17, 1996 that explicitly permitted use of interest-bearing accounts. *See* WAC 208-680E-011(1)(c).

39. Justice SANDERS, who had become a member of the Washington Supreme Court after its September 1995 adoption of APR 12(h) and APR 12.1, wrote a letter dated March 13, 1996 to members of the escrow industry, indicating that the Court was reconsidering its earlier decision and asking for responses to a variety of questions regarding the duties of LPOs. Numerous comments were received by the Court during April and May 1996 regarding the new rules, both pro and con.

40. Justice SANDERS indicated in subsequent correspondence that the Court had voted on May 8, 1996 not to repeal APR 12(h) and APR 12.1, with Justice SANDERS and one other Justice voting for repeal.

41. Apparently believing that the escrow industry was taking insufficient steps to comply voluntarily with APR 12.1, the Limited Practice Board (the "Board") in mid-1996 submitted to the Washington Supreme Court proposed changes in its rules and regulations for admission and discipline. The Court accepted comments on the proposed changes until October 11, 1996, and is now considering whether to approve the changes. Among the proposed changes -- virtually all apparently designed to compel compliance with APR 12.1 by LPOs -- are: a rule requiring LPOs annually to complete questionnaires designed to determine whether they are complying with APR 12.1 (Disciplinary Rule ("DR") 11.4), a rule permitting the Board to examine the books and records of any LPO (or of a closing firm, if an LPO participated in its closings) suspected of noncompliance with APR 12.1, or the books and records of *any* randomly selected LPO or affiliated closing firm (DR 11.1), a rule permitting the Board to examine "without

notice" all documents selected, prepared, and completed by authority of APR 12 (Rule 10.1), a rule providing absolute immunity from suit to anyone providing information to the Board (DR 9.1(B)), a rule permitting the Board to impose financial sanctions against those found to have violated the Board's rules (DR 1.10), and a rule extending the Board's jurisdiction to include disciplinary authority against LPOs even after they have resigned their commissions (DR 1.2).

Operation of the IOLTA Program

42. Since its inception in 1985, interest generated by IOLTA accounts and forwarded to the LFofW has generally amounted to between $2.5 million and $4.0 million per year. IOLTA income reached $4.0 million in 1990 and subsequently dropped off somewhat due to declining interest rates. IOLTA income for 1995 was $2.7 million.

43. According to the WSBA, expansion of the IOLTA Program to include trust accounts in transactions closed by LPOs was justified because: (1) LPOs and attorneys should be subject to similar rules because they perform similar functions; and (2) the decline in post-1990 IOLTA income had helped to create "a crisis in our system of civil justice" in which 3/4 of low-income persons "cannot get the legal advice or representation they need about their most basic legal services."

44. LFofW has extremely broad discretion regarding the use of its income. LFofW is authorized under its Articles of Incorporation to award grants to § 501(c)(3) nonprofit corporations for the purpose of providing legal services and education to the public in civil law matters.

45. Throughout its history, LFofW has awarded the great majority of its grant funds to Columbia Legal Services

("Columbia") and Columbia's three predecessors-in-interest: Evergreen Legal Services ("Evergreen"), Puget Sound Legal Services ("Puget Sound"), and Spokane Legal Services ("Spokane"). For example, in 1995, more than $2.5 million of LFofW's $3.1 million in grant awards went to Columbia.

46. Columbia and its predecessors have used their IOLTA grant funds to support litigation and other causes to which some citizens of Washington object for political or ideological reasons. As just one example, after Seattle adopted an ordinance banning aggressive panhandling, Evergreen filed a facial challenge to the ordinance, alleging that the ordinance's prohibition against sitting or lying on public sidewalks in commercial areas chilled beggars' First Amendment rights to free expression. The U.S. Court of Appeals for the Ninth Circuit recently affirmed a decision dismissing the suit. *Roulette v. City of Seattle,* 78 F.3d 1425 (9th Cir. 1996). Columbia's motion for rehearing was subsequently denied. 97 F.3d 300 (9th Cir. 1996).

47. The political nature of Columbia's legal work is confirmed by its recent reorganization. Historically, much of the funding for local legal services organizations such as Evergreen, Puget Sound, and Spokane came from the federal Legal Services Corporation ("LSC"). Concerned that local legal services organizations were using funds for purposes it deemed inappropriate, Congress in 1996 enacted legislation that prohibited LSC fund recipients from engaging in certain types of litigation -- including class action litigation and litigation on behalf of undocumented aliens. Evergreen, Puget Sound, and Spokane did not wish to be bound by those restrictions. Accordingly, they merged as of December 31, 1995 to form Columbia and announced that Columbia would not accept LSC funds. Simultaneously, they facilitated the creation of Northwest Justice Project, which does accept LSC

funds and provides many of the less controversial legal services formerly provided by Evergreen, Puget Sound, and Spokane. Northwest Justice Project shares office space with Columbia throughout Washington and, in some cases, shares personnel.

48. LFofW -- in order to facilitate the efforts of Columbia to provide the types of legal services deemed too controversial by Congress -- awards the bulk of its IOLTA grants to Columbia and none to Northwest Justice Project.

49. Other recent recipients of IOLTA grant awards whose IOLTA-funded activities are political and/or ideological in nature include the Northwest Immigrants Rights Project and the Northwest Communities Education Center (which have assisted undocumented aliens seeking to avoid deportation), the Fremont Public Association (which has lobbied and sued various government entities on behalf of clients seeking higher welfare benefits), and the National Lawyers Guild.

The Plaintiffs' Dealings with IOLTA

50. As noted in Paragraphs 6-7, Plaintiffs BROWN and HAYES regularly purchase and sell real estate as part of their business dealings. Such transactions have occurred since the December 1995 effective date of APR 12(h) and 12.1 and are highly likely to continue. As part of such transactions, agents acting on behalf of BROWN and HAYES routinely hold in trust funds belonging to them pending completion of the transactions.

51. Plaintiffs BROWN and HAYES have every reason to believe that the agents holding such trust funds have, since December 1995, placed the trust funds into IOLTA accounts and/or will place such trust funds into IOLTA accounts --

because virtually all of the agents employed by BROWN and HAYES make use of the services of LPOs in selecting appropriate legal documents, and because APR 12.1 has been applicable since December 1995 to all real estate transactions closed with the assistance of an LPO.

52. Plaintiffs BROWN and HAYES have informed LPOs with whom they transact business that they do not wish their trust funds placed into IOLTA accounts. Those LPOs have responded that they are bound by APR 12(h) and 12.1 and that, under the terms of those rules, their only practical option is to place trust funds into an IOLTA account.

53. Because Washington banks generally are unwilling to provide free accounting services on interest-bearing checking accounts, Plaintiffs BROWN and HAYES do not receive the benefit of such services when their escrow agents are required to place trust funds into interest-bearing IOLTA accounts.

54. Plaintiffs BROWN and HAYES object to some of the uses to which recipients of LFofW grants (the "Recipient Organizations") are putting IOLTA grant funds and thus object to being forced to associate with the Recipient Organizations by having the interest generated from their trust funds used to finance the Recipient Organizations.

55. Any interest income derived from Plaintiffs BROWN's and HAYES's funds rightfully belong to them. They object to anyone other than themselves receiving the interest derived from those funds.

56. Plaintiff MAXWELL has been trained and licensed as an LPO but is now unable to practice her profession because of the adoption of APR 12(h) and 12.1. Because her employer, PNW Title, correctly determined that compliance with APR 12(h) and 12.1 would entail violation of its fiduciary obligation to its clients and would result in a

violation of their constitutional rights, MAXWELL was forced to abandon her chosen profession in order to maintain her employment with PNW Title.

57. Even had MAXWELL decided to resign from PNW Title and form her own escrow company in order to continue as an LPO, she could not have complied with APR 12(h) and 12.1 without violating her fiduciary obligation to act in the best financial interest of her clients. MAXWELL has been told by some clients that they do not wish to be associated with the LFofW and the Recipient Organizations, and do not wish their funds to be used to generate interest for the IOLTA program. As an experienced professional involved with the escrow industry, MAXWELL believes that the escrow industry cannot provide the same services at the same price to its clients if the industry itself must begin paying for the accounting services that formerly were provided free-of-charge by the banking industry.

58. Plaintiff DAUGS has been placed in an untenable position because of the adoption of APR 12(h) and 12.1. If he complies with APR 12(h) and 12.1 by placing client trust funds into an IOLTA account, he will violate his clients' rights under the First and Fifth Amendments to the U.S. Constitution, and will violate his fiduciary duty of loyalty to his clients (which requires him to act solely in the interest of and on behalf of his clients as to matters relating to the administration of the clients' funds). If he does not comply with APR 12(h) and 12.1, he risks disciplinary action by the Washington Supreme Court.

59. Plaintiff DAUGS objects to some of the uses to which Recipient Organizations are putting IOLTA grant money and thus objects to being forced to associate with the Recipient Organizations by depositing client trust funds into an IOLTA account. Plaintiff DAUGS further believes that

APR 12(h) and 12.1 prevent him from carrying out his fiduciary responsibilities to his clients by not permitting him to give his clients the option of designating that their trust funds not be placed into an IOLTA account.

60. Plaintiff WLF is a membership organization whose members include Washington citizens who -- like Plaintiffs BROWN and HAYES -- have had and/or are likely in the future to have funds placed into IOLTA accounts. Those members do not wish to be associated in that manner with LFofW and the Recipient Organizations and do not wish interest on their funds to go to anyone but themselves. Other WLF members include Washington LPOs who -- like Plaintiff DAUGS -- believe that they are being prevented from carrying out their fiduciary duties to their clients by not being permitted to give their clients the option of placing their trust funds into non-interest-bearing accounts. Other WLF members include recently-resigned LPOs who -- like Plaintiff MAXWELL -- have been forced to resign from their chosen profession in order to maintain employment with an employer who believes that compliance with APR 12(h) and 12.1 would violate its fiduciary duties to its clients.

61. On August 21, 1992, WLF filed a petition with the Supreme Court of Washington that, *inter alia,* asked the Court to prohibit the deposit of funds into an IOLTA account unless the owner of those funds provided his or her informed consent to such deposit. The Court did not respond to WLF's petition.

COUNT I
(First Amendment)

62. Plaintiffs incorporate herein by reference the allegations of Paragraphs 1 through 61.

63. The forced collection and use, under color of state law, of interest generated from funds belonging to Plaintiffs BROWN and/or HAYES, and/or belonging to similarly situated members of Plaintiff WLF, despite their objections to some of the uses to which that interest is put, deprive Plaintiffs BROWN and HAYES, and members of Plaintiff WLF of their rights to freedom of speech and association guaranteed by the First Amendment of the U.S. Constitution.

64. The forced collection and use, under color of state law, of interest generated from trust funds being held by Plaintiff DAUGS and/or being held in the trust accounts of similarly situated members of WLF, despite their objections to some of the uses to which that interest is being put, deprive Plaintiff DAUGS and members of Plaintiff WLF of their rights to freedom of speech and association guaranteed by the First Amendment to the U.S. Constitution.

65. Requiring Plaintiff MAXWELL and similarly situated members of WLF, under color of state law, to associate with the LFofW and the Recipient Organizations by requiring them -- as a condition of their continued licensure as LPOs -- to collect interest generated on trust funds they are handling on behalf of clients and to forward that interest to the LFofW, despite their objections to some of the uses to which that interest is put, deprive Plaintiff MAXWELL and members of Plaintiff WLF of their rights to freedom of speech and association guaranteed by the First Amendment to the U.S. Constitution.

COUNT II
(Fifth Amendment)

66. Plaintiffs incorporate herein by reference the allegations of Paragraphs 1 through 61.

67. The Fifth Amendment to the U.S. Constitution guarantees that private property shall not be taken for public use, without just compensation. The taking, under color of state law, of the interest earned on Plaintiffs BROWN's and HAYES's funds placed into IOLTA accounts -- and on funds of similarly-situated members of WLF placed into IOLTA accounts -- constitutes an illegal taking of property belonging to them, in violation of the Fifth Amendment to the U.S. Constitution.

68. The taking, under color of state law, of the interest earned on funds placed into an IOLTA account maintained in connection with any transaction closed by Plaintiffs MAXWELL and DAUGS -- and on funds placed into an IOLTA account of similarly situated WLF members -- constitutes an illegal taking of the property of the clients of Plaintiff MAXWELL and DAUGS and of similarly situated WLF members, in violation of the Fifth Amendment to the U.S. Constitution.

COUNT III
(Fifth Amendment)

69. Plaintiffs hereby incorporate by reference the allegations of Paragraphs 1 through 61.

70. Defendants' taking of the equitable or beneficial interest in (use of) client funds, under color of state law, by requiring their placement into IOLTA accounts, constitutes an illegal taking of the beneficial use of those funds, in violation of Plaintiffs' rights under the Fifth Amendment to the U.S. Constitution.

WHEREFORE, Plaintiffs respectfully request the following relief:

(1) Enter judgment requiring Defendants LEGAL FOUNDATION of WASHINGTON and KELLY to refund the full amount of interest earned on Plaintiffs BROWN's and HAYES's money placed into IOLTA trust accounts, plus interest.

(2) Enter judgment declaring Admission to Practice Rules 12(h) and 12.1 void as an unconstitutional deprivation of Plaintiffs' rights under the First and Fifth Amendments to the U.S. Constitution, insofar as they *require* LPOs to place certain client funds into IOLTA trust accounts.

(3) Permanently enjoin the nine Defendants who are members of the Washington Supreme Court from taking any disciplinary action against LPOs who fail to comply with the requirements of Admission to Practice Rules 12(h) and 12.1; and from adopting any rules that purport to require LPOs, as a condition for practicing their profession in Washington, to handle client trust funds in a manner designed to ensure that interest on those funds will accrue to anyone not designated by the client.

(4) Award Plaintiffs the costs of this action, including attorney fees as provided for by 42 U.S.C. § 1988.

(5) Award such other relief as the Court may deem just.

Respectfully submitted,

s/
James J. Purcell
(WSBA #9180)
1218 3rd Ave., #2307
Seattle, WA 98101
(206) 622-5322

s/
Daniel J. Popeo

s/
Richard A. Samp
Washington Legal Found.
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: February 7, 1997 Counsel for Plaintiffs

ANSWER TO COMPLAINT OF DEFENDANTS LEGAL FOUNDATION OF WASHINGTON AND ITS PRESIDENT
March 3, 1997

Defendants Legal Foundation of Washington and its president Kevin F. Kelly (collectively, "LFW") answer the respective paragraphs of the Amended Complaint for Injunctive Relief ("Complaint") as follows:

1. This introductory paragraph contains no allegations and thus requires no response from LFW.

2. LFW admits that under the IOLTA program, enforced by Washington officials, LPOs and attorneys are required under certain circumstances to cause to be forwarded to the Legal Foundation of Washington the interest earned after fees and expenses on funds held in pooled trust accounts. To the extent this paragraph alleges anything other or broader than this, LFW denies the same.

3. LFW denies that any procedure involving LFW violates plaintiffs' rights under the First and Fifth Amendments to the United States Constitution.

4. LFW admits the first sentence and denies the second.

5. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same. LFW denies that the Washington Legal Foundation has standing on its own or on behalf of its members.

6. LFW admits the allegation contained in the third sentence of this paragraph. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

7. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

8. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

9. LFW denies that the changes to the IOLTA program adopted by the Washington Supreme Court in 1995 require an LPO to ensure that funds placed in trust in connection with "any" real estate transaction in which the LPO performs services be deposited in an "IOLTA account." Funds only need to be deposited in a pooled account under circumstances where the LPO could not establish a separate account for the client that would yield a positive net return to that client. LFW denies the last sentence. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

10. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

11. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in the first sentence of this paragraph, and it therefore denies the same. LFW denies that DAUGS has standing to sue on behalf of anyone else.

12. LFW admits, except that the Legal Foundation of Washington only receives interest earned after fees and expenses on pooled accounts.

13. LFW admits.

14. LFW admits.

15. LFW admits.

16. LFW admits.

17. LFW admits.
18. LFW admits.
19. LFW admits.
20. LFW admits.
21. LFW admits.
22. LFW admits.
23. LFW admits the first sentence. As to the second sentence, the Supreme Court's order did not directly incorporate and establish the Legal Foundation of Washington or promulgate its articles and bylaws, but rather it ordered the Washington Bar Association to do so by January 1, 1985.
24. LFW admits the first sentence. As to the remainder of the paragraph, the Disciplinary Rules of the Code of Professional Responsibility speak for themselves and must be read and interpreted in context. The Legal Foundation of Washington only receives interest earned after fees and expenses on pooled accounts.
25. LFW admits.
26. LFW admits.
27. LFW admits the first sentence as to pooled trust accounts. LFW denies the allegations in the second sentence to the extent they imply that banks always or regularly provided to clients, as opposed to their attorneys, special accounting services or that such services were "free of charge." LFW denies that any special accounting services that banks provided directly benefited those whose funds were being held in non-interest bearing trust accounts.
28. LFW admits that at least some banks began charging discrete fees for such special accounting services.
29. LFW admits that the Washington Supreme Court amended RPC 1.14. As to the remainder of the paragraph, the Rule speaks for itself and must be read and interpreted in context.

30. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same. Some accounting services are provided on any account.
31. LFW admits, without suggesting that such practices were legal.
32. LFW admits.
33. LFW denies the first sentence. As the remainder of the paragraph, the Rule speaks for itself and must be read and interpreted in context. The Washington Supreme Court did not attempt to settle the referenced legal controversy by adopting APR 12. Rather, that controversy was settled by the Court's decisions in Washington State Bar Ass'n v Great Western Union Federal Savings & Loan, 91 Wn.2d 48, 586 P.2d 870 (1978), and Bennion, Van Camp. Hagan & Ruhl v. Kassler Escrow. Inc., 96 Wn.2d 443, 635 P.2d 730 (1981), where the Court held such practices to be unauthorized practice of law.
34. LFW admits that when an LPO receives client funds in trust the LPO must handle them pursuant to APR I2 and RPC 1.14. The Rules speak for themselves and must be read and interpreted in context.
35. LFW's "arguments" and the "arguments" of other "proponents" speak for themselves and must be read and interpreted in context. LFW denies that escrow companies that operated without attorneys always or regularly shared any savings from special accounting services with their clients.
36. LFW admits that the Rules were adopted. The Rules speak for themselves and must be read and interpreted in context.
37. APR 12 speaks for itself and must be read and interpreted in context.

38. LFW admits the first sentence. The cited WAC provisions speak for themselves and must be read and interpreted in context. LFW admits that WAC 308-128E-011(1) generally prohibited interest-bearing accounts. LFW believes that at least some non-compliance was the result of willful disobedience. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

39. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

40. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

41. LFW admits, except as to the conjecture of the beliefs of the Limited Practice Board, but asserts that the proposed rules must be read and interpreted in context. LFW admits that voluntary compliance has been inadequate.

42. LFW admits, except that IOLTA revenue was below $2.5 million in some years, and the figure. for 1990 is $3.9 million.

43. The WSBA's position speaks for itself and must be read and interpreted in context.

44. LFW denies that its discretion is "extremely broad." LFW otherwise admits.

45. LFW lacks sufficient knowledge or information to enable it to admit or deny whether Columbia Legal Services is technically a successor-in-interest to Evergreen, Puget Sound, and Spokane Legal Services, and it therefore denies the same. LFW admits that a majority of its grant funds have gone to the listed entities.

46. LFW admits that Columbia, Evergreen, Puget Sound, and Spokane Legal Services have acted as legal counsel for their clients in the pursuit of litigation and other legal remedies. LFW admits that some citizens of Washington oppose or disagree with some claims made by some of these clients in some of these legal actions. LFW admits that some citizens might have political or ideological reasons for objecting to judicial resolution of these claims. LFW admits that Evergreen and other legal counsel represented plaintiffs in *Roulette v. City of Seattle*, and that the Ninth Circuit has affirmed the trial court's dismissal of that lawsuit and subsequently denied rehearing. To the extent this paragraph alleges or suggests anything other or broader than this, LFW denies the same.

47. LFW denies the first sentence, admits the second sentence, and lacks sufficient knowledge or information to enable it to admit or deny the remainder of the paragraph, and it therefore denies the same.

48. LFW denies.

49. LFW admits that the named entities have received funds from the Legal Foundation of Washington at one time or another. LFW denies the remaining allegations of this paragraph.

50. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

51. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

52. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

53. LFW denies that Washington banks ever provided "free" special accounting services or that the provision by banks of special accounting services to escrow agents would, generally or regularly benefit these plaintiffs or other clients of such agents.

54. LFW denies that BROWN and HAYES are forced to associate with the Recipient Organizations. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

55. LFW denies the first sentence of this paragraph. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

56. LFW denies that MAXWELL is unable to practice her profession because of the adoption of APR 12(h) and 12.1, and LFW denies that PNW Title was correct if it concluded that compliance with APR I 2(h) and 12. I would entail violation of PNW Title's fiduciary obligation to its clients and would result in a violation of their constitutional rights. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

57. LFW denies the allegations in the first sentence of this paragraph. LFW lacks sufficient knowledge or information to enable it to admit or deny the remaining allegations in this paragraph, and it therefore denies the same.

58. LFW denies the allegations in the first and second sentences of this paragraph. LFW admits the allegation in the third sentence of this paragraph.

59. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

60. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

61. LFW lacks sufficient knowledge or information to enable it to admit or deny the allegations in this paragraph, and it therefore denies the same.

62. LFW incorporates by reference its responses to the referenced paragraphs of the complaint.

63. LFW denies.

64. LFW denies.

65. LFW denies.

66. LFW incorporates by reference its responses to the referenced paragraphs of the complaint.

67. LFW admits the allegation in the first sentence of this paragraph. LFW denies the remaining allegations in this paragraph.

68. LFW denies.

69. LFW incorporates by reference its responses to the referenced paragraphs of the complaint.

70. LFW denies.

AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a claim entitling them to relief.

2. Plaintiffs lack standing.

3. The Eleventh Amendment and the doctrine of sovereign immunity prevent the Court from awarding plaintiffs any monetary relief.

4. Any taking of plaintiffs' property is the result of private action (i.e., the unlawful conduct of LPOs in failing to invest client funds in an account for the benefit of the client when such an account could provide the client a positive net return).

5. Plaintiffs have never demanded the payment of interest on accounts of the type at issue here and have consented to their failure to receive interest.

6. Plaintiffs are not the real parties in interest.

7. The equitable relief sought by plaintiffs is precluded by such equitable doctrines as laches, waiver, and unclean hands.

PRAYER

WHEREFORE, LFW prays for judgment:

1. Dismissing plaintiffs' claims with prejudice;

2. Awarding LFW its costs, including reasonable attorneys fees; and

3. Awarding LFW such other or further relief in law or equity that the Court deems appropriate or just.

DATED: March 3, 1997

PERKINS COIE

By /s/_____
David J. Burman, WSBA #10611
Nicholas P. Gellert, WSBA #18041
Attorneys for Defendants
Legal Foundation of Washington and
Kevin F. Kelly

ANSWER TO COMPLAINT OF SUPREME COURT DEFENDANTS
March 10, 1997

Barbara Durham, Chief Justice of the Supreme Court of Washington; Gerry L. Alexander, Justice; James M. Dolliver, Justice; Richard P. Guy, Justice; Charles W. Johnson, Justice; Barbara A. Madsen, Justice; Charles Z. Smith, Justice; and Philip A. Talmadge, Justice ("Defendants"), in answer to plaintiffs' Amended Complaint for Injunctive Relief, admit, deny and allege as follows:

1. In response to Paragraph 1, Defendants admit that this is an action alleging that certain rules promulgated by the Supreme Court of Washington relating to Certified Closing Officers are unconstitutional, deny that those rules are unconstitutional, and deny the remaining allegations of Paragraph 1.

2. In response to Paragraph 2, Defendants admit that the Supreme Court of Washington has adopted rules relating to interest on lawyer trust accounts and certified closing officers, the terms of which speak for themselves. defendants deny the remaining allegations of Paragraph 2.

3. The allegations of Paragraph 3 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of Paragraph 3 are denied.

Jurisdiction

4. The allegations of Paragraph 4 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of Paragraph 4 are denied.

5-8. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 5 through 8 and therefore deny them.

9. The allegations contained in the first sentence of Paragraph 9 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of the first sentence of Paragraph 9 are denied. Defendants are without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 9 and therefore deny them.

10. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 and therefore deny them.

11. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in the first sentence of Paragraph 11 and therefore deny them. The allegations of the second sentence of Paragraph 11 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of the second sentence of Paragraph 11 are denied.

12. Defendants admit the allegations of the first sentence of Paragraph 12. The remaining allegations of Paragraph 12 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of Paragraph 12 are denied.

13-22. Defendants admit the allegations of Paragraphs 13 through 22.

Statement of the Claim
Creation of the IOLTA Program

23-25. In response to Paragraphs 23 through 25, Defendants admit that on June 19, 1984, the Supreme Court

of Washington entered Order No. 25700-A-357 In the Matter of the Adoption of Amendments to CPR DR 9-102, the provisions of which speak for themselves. The remaining allegations Paragraphs 23 through 25 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the allegations of Paragraphs 23 through 25 are denied.

26. In response to Paragraph 26, Defendants admit that a copy of the current version of RPC 1.14 is attached to the Amended Complaint as Exhibit A. The remaining allegations of Paragraph 26 constitute legal conclusions and arguments to which no response is required. To the extent a response is required, the remaining allegations of Paragraph 26 are denied.

27-28. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 27 and 28 and therefore deny them.

29. In response to the second sentence of Paragraph 29, Defendants state that the provisions of RPC 1.14 speak for themselves. The remaining allegations of Paragraph 29 legal conclusions and arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraph 29 are denied.

30. Defendants lack information sufficient to form a belief as to the truth of the allegations of Paragraph 30 and therefore deny them.

Limited Practice Officers

31-32. Defendants lack information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 31 and 32 and therefore deny them.

33. Defendants deny the allegations of the first sentence of Paragraph 33. I response to the second sentence of Paragraph 33, Defendants admit that the Supreme Court of Washington adopted APR 12, the terms of which speak for themselves. The remaining allegations of Paragraph 33 constitute legal conclusions or arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraph 33 are denied.

34-35. Defendants admit that the Supreme Court of Washington received a proposal from the Washington Bar Association in June of 1993 to amend APR 12, that proponents and opponents of the proposal submitted comments and briefs in connection with the proposed rule changes, and that oral argument on the petition was conducted on September 24, 1994. The remaining allegations of Paragraphs 34 and 35 constitute legal conclusions or arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraphs 34 and 35 are denied.

36. Defendants admit that by order dated September 21, 1995, the Washington Supreme Court amended APR 12 to add new subsection, 12(h), and adopted APR 12.1, the terms of which speak for themselves, and that a copy of APR 12(h) and 12.1 is attached to the amended complaint as Exhibit B. The remaining allegations of Paragraph 36 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraph 36 are denied.

37. In response to the allegations of Paragraph 37, Defendants state that the terms of APR 12(h) and APR 12.1 speak for themselves. The allegations contained in Paragraph 37 constitute legal conclusions or arguments to which no

answer is required. To the extent an answer is required, the remaining allegations of Paragraph 37 are denied.

38. Defendants admit that APR 12.1 and APR 12(h) became effective December 9, 1995. Defendants are without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 38 and therefore deny them.

39. Defendants admit that Justice Sanders wrote a letter dated March 13, 1996, concerning APR 12.1, the terms of which speak for themselves, and deny the remaining allegations of Paragraph 39.

40. Defendants admit that Justice Sanders prepared subsequent correspondence concerning APR 12.1, the terms of which speak for themselves, and deny the remaining allegations of Paragraph 40.

41. Defendants admit that the Limited Practice Board has submitted proposed changes to its rules for admission and discipline, the terms of which speak for themselves; that comments have been received with regard to the proposed changes; and that the proposed changes are under consideration. The remaining allegations of Paragraph 41 constitute legal conclusions and arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraph 41 are denied.

42. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 42 and therefore deny them.

43. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraph 43 and therefore deny them.

44. In response to Paragraph 44, Defendants state that the Articles of Incorporation of the Legal Foundation of Washington speak for themselves and that the allegations of

Paragraph 44 constitute legal conclusions or arguments to which no answer is required. To the extent an answer is required, the remaining allegations of Paragraph 44 are denied.

45-49. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 45 through 49 and therefore deny them.

The Plaintiffs' Dealing with IOLTA

50-54. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 50 through 54 and therefore deny them.

55. The first sentence of Paragraph 55 constitutes legal conclusions or arguments to which no answer is required. To the extent an answer is required, the allegations of the first sentence of Paragraph 55 are denied. Defendants are without information sufficient to form a belief as to the truth of the allegations of second sentence of Paragraph 55 and therefore deny them.

56. In response to the second sentence of Paragraph 56, Defendants deny that compliance with APR 12(h) and APR 12.1 would entail violation of a fiduciary obligation. Defendants are without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 56 and therefore deny them.

57. In response to the allegations of the first sentence of Paragraph 57, Defendants deny that compliance with APR 12(h) and APR 12.1 would violate fiduciary obligations. Defendants are without information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 57 and therefore deny them.

58. Defendants deny the allegations of the first sentence of Paragraph 58. The remaining allegations of Paragraph 58 constitute legal conclusions or arguments to which no answer is required. To the extent an answer is required, the allegations of Paragraph 58 are denied.

59-61. Defendants are without information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 59 through 61 and therefore deny them.

Count I
(First Amendment)

62. Defendants incorporate by reference their answers to the allegations of Paragraphs 1 through 61.

63-65. The allegations of Paragraphs 63 through 65 constitute legal conclusions to which no answer is required. To the extent an answer is required, the allegations of Paragraphs 63 through 65 are denied.

Count II
(Fifth Amendment)

66. Defendants incorporate by reference their answers to the allegations of Paragraphs 1 through 61.

67-68. The allegations of Paragraphs 67 and 68 constitute legal conclusions to which no answer is required. To the extent an answer is required, the allegations of Paragraphs 67 and 68 are denied.

Count III
(Fifth Amendment)

69. Defendants incorporate by reference their answers to the allegations of Paragraphs 1 through 61.

70. The allegations of Paragraph 70 constitute legal conclusions to which no answer is required. To the extent an answer is required, the allegations of Paragraphs 70 are denied.

BY WAY IF FURTHER ANSWER AND AFFIRMATIVE DEFENSES, Defendants allege:

1. That the Court lacks jurisdiction over the subject matter of this action.

2. That defendants are immune from suit for matter charged in Plaintiffs' Amended Complaint.

3. That Plaintiffs have failed to state a claim upon which relief may be granted.

4. That the bar of collateral estoppel applies.

WHEREFORE, having fully answered the Amended Complaint herein, Defendants request the following relief:

1. That Plaintiffs' Amended Complaint be dismissed with prejudice.

2. That Defendants be awarded their costs and attorneys' fees.

3. That the Court order such further relief as may be appropriate.

DATED this 10th day of March, 1997.

CHRISTINE O. GREGOIRE
Attorney General

s/ MAUREEN HART
MAUREEN HART, WSBA #7831
Solicitor General
(360) 753-2536

DECLARATION OF BILL RONHAAR

1. I, Bill Ronhaar, am over 18 years of age, and am competent to testify about the matters set forth herein. I make this declaration in support of Plaintiffs' Motion for Summary Judgment.

2. I am Manager of Land Title Company of Skagit County, located in Mt. Vernon, Washington.

3. In April 1997, Land Title Company was involved as escrow agent in connection with a contract to sell real estate located at 520 N. 21st St., Mt. Vernon, Washington 98273. Pursuant to the terms of the purchase and sales agreement, Mr. Allen Brown (the purchaser) deposited $90,521.29 with Land Title Company.

4. Land Title Company deposited the funds in its escrow account, maintained at Skagit State Bank. At the time of the deposit, the escrow account was an IOLTA account paying interest at a rate of 1% per annum. An IOLTA account is one in which interest is paid to the Legal Foundation of Washington. Land Title Company established an IOLTA account solely because it was required to do so by APR 12.1.

5. Mr. Brown's funds remained in Land Title Company's escrow account for two days until May 1, 1997, when the sale closed and the escrow funds were disbursed.

I state under penalties of perjury that based on my personal knowledge the foregoing is true.

s/ BILL RONHAAR
Bill Ronhaar

Dated: November 3, 1997

AFFIDAVIT OF SHARON S. BRINLEY

SHARON S. BRINLEY, being first duly sworn on oath, deposes and says:

1. I, Sharon S. Brinley, am over 18 years of age, and am competent to testify about the matters set forth herein, and I submit the testimony below based upon personal knowledge and information. I make this affidavit in connection with Plaintiffs' Motion for Summary Judgment.

2. I am employed in the Escrow Department of Fidelity National Title Company of Washington ("Fidelity") in Bellevue, Washington. I am a Limited Practice Officer (LPO) pursuant to the Supreme Court of Washington's Admission to Practice Rule (APR) 12.

3. In connection with my employment, I handled the closing of the 1996 sale of real estate located at 807 - 3rd Avenue North, Kent, Washington 98032 (the "Sale"). The seller in that transaction was Kevin W. Beck; the buyers were Roger L. Fossum and Plaintiff Gregory W. Hayes.

4. On our about August 14, 1996, I received from the buyers a check for $2,000, which represented their earnest money deposit in connection with the sale. I deposited that check into Fidelity's IOLTA trust account, maintained at SEAFIRST Bank. Attached hereto as Exhibit A is the receipt given by Fidelity to the buyers in connection with that earnest money deposit. [Exhibit Omitted.]

5. On or about August 28, 1996, I gave to the buyers an estimated closing statement for the sale, attached hereto as

Exhibit B. That document indicated that the buyers were required to provide an additional $12,793.32 to close the Sale. [Exhibit Omitted.]

6. On or about August 28, 1996, I received from the buyers a certified check in the amount of $12,780.87, and personal check no. 5594 in the amount of $12.45, for a total deposit of $12,793.32 in connection with the closing. I deposited the check into Fidelity's IOLTA trust account.

7. The Sale closed on or about August 30, 1996, and funds held in the Fidelity's trust account were disbursed in accordance with the closing instructions. Attached hereto as Exhibit C is the final closing statement, dated August 30, 1996. [Exhibit Omitted.]

8. I deposited funds received from the buyers into Fidelity's IOLTA account pursuant to the requirements of APR 12.1. That account is an interest-bearing account, with interest earned thereon being paid by SEAFIRST Bank to the Legal Foundation of Washington.

9. Some time after the adoption of APR 12.1 by the Supreme Court of Washington in 1995, SEAFIRST Bank stopped offering earnings credits on Fidelity's interest-bearing IOLTA trust account. Earnings credits are credits offered by Washington Banks to some of their customers based on the amount of funds the customers maintain in their non-interest-bearing accounts; although not redeemable for cash, the credits can be used to obtain a wide variety of bank services (such as account reconciliations, money transfer charges, and returned check charges) at no cost. SEAFIRST Bank was not

offering earnings credits to Fidelity on its IOLTA trust account in August 1996, nor is it doing so today.

Further affiant sayeth not.

DATED this 3rd day of November, 1997.

s/ SHARON S. BRINLEY
Sharon S. Brinley

SUBSCRIBED AND SWORN to before me this 3rd day of November, 1997.

s/ MICHAEL A. LYNCH
Michael A. Lynch
Notary Public in and for
the State of Washington
Residing at: Issaquah
My commission expires: 6-9-98

DECLARATION OF ALLEN BROWN

1. I, Allen Brown, am over 18 years if age, and am competent to testify about the matters set forth herein.

2. In the course of my business dealings, I regularly purchase and sell real estate located in the State of Washington, and I expect to continue to do so.

3. In April 1997, I entered into a contract to purchase real estate located at 520 N. 21st St., Mt. Vernon, Washington 98273. Pursuant to the terms of the purchase and sales agreement, I deposited $90,521.29 with Land Title Company, whose escrow department was handling the closing. It is my understanding that Land Title Company deposited the escrow funds in an IOLTA account maintained at Skagit State Bank. The funds remained in that account for two days until May 1, 1997, when the sale was closed and the escrow funds were disbursed.

4. Based on my understanding that funds I paid to Land Title Company were deposited in an interest-bearing account, I believe that interest on my funds was paid to Defendant Legal Foundation of Washington (LFofW). I object to anyone other than me taking the interest earned on my funds. I also object to some of the activities engaged in by LFofW and by those to whom LFofW distributes IOLTA funds.

I state under penalties of perjury that based on my personal knowledge the foregoing is true.

s/ ALLEN BROWN
Allen Brown
Dated: November 3, 1997

DECLARATION OF GREGORY HAYES

1. I, Gregory Hayes, am over 18 years of age, and am competent to testify about the matters set forth herein. I make this declaration in support of Plaintiffs' Motion for Summary Judgment.

2. In the course of my business dealings, I have purchased real estate located in the State of Washington, and I expect to continue to do so.

3. In August 1996, I (along with my business partner, Roger Fossum) entered into a contract to purchase real estate located at 807 3rd Ave. North, Kent, Washington 98032. Pursuant to the terms of the purchase and sales agreement, Mr. Fossum and I on or about August 14, 1996, each gave a $1,000 earnest money deposit to Fidelity National Title Co. (of Bellevue, Washington). Based on a notation included on a receipt given to us by Fidelity, I believe that Fidelity deposited the earnest money funds into its IOLTA account.

4. On or about August 28, 1996, Mr. Fossum and I each gave an additional $6,396.66 to Fidelity, the amount needed to close the transaction. The transaction closed (and Fidelity disbursed funds being held in escrow) on August 30, 1996.

5. Based on my understanding that funds I paid to Fidelity were deposited in an interest-bearing IOLTA account, I believe that interest on my funds was paid to Defendant Legal Foundation of Washington (LFofW). I object to anyone other than me taking the interest earned on my funds.

I also object to some of the activities engaged in by LFofW and by those to whom LFofW distributes IOLTA funds.

6. I was never informed at the time we purchased the Kent, Washington property that my escrow funds were being placed into an IOLTA account. Indeed, I never heard of IOLTA until after the transaction had been completed.

I state under penalties of perjury that based on my personal knowledge the foregoing is true.

s/ GREGORY HAYES
Gregory Hayes

Dated: November 3, 1997

DECLARATION OF DENNIS H. DAUGS

1. I, Dennis H. Daugs, am over 18 years of age, and am competent to testify about the matters set forth herein. I make this declaration in support of Plaintiffs' Motion for Summary Judgment.

2. I am President and co-owner, along with my wife Nina Daugs, of SeaTac Escrow, Inc. ("SeaTac"), an escrow company operating in Federal Way, Washington. SeaTac provides escrow services to buyers and sellers in connection with real estate transactions.

3. Incidental to my duties as an escrow officer for SeaTac, I select and fill in blanks on pre-approved form legal documents necessary to effectuate the transfer of title to real estate from a seller to a purchaser; I am authorized to select and fill in such documents by virtue of being licensed as an LPO ("Limited Practice Officer") by the Supreme Court of Washington. Although the selecting and filling in of form legal documents is a necessary component of the real estate closing process, those activities do not in fact constitute more than a negligible portion of the time that I spend on behalf of escrow customers.

4. I regularly deposit into SeaTac's escrow account funds given to me by my customers. As the trustee of those funds, I owe a fiduciary duty of loyalty to my customers to act in their best interests at all time. Although equitable title to the funds remains in the hands of my customers, SeaTac holds legal title to funds in SeaTac's escrow account.

5. Because I am an LPO, APR 12.1 mandates that I place escrow funds into an interest-bearing IOLTA account and direct my bank to forward interest generated by the account to the Legal Foundation of Washington.

6. However, I do not comply with APR 12.1 because I have determined that doing so would violate SeaTac's Fifth Amendment rights (as the holder of legal title to funds in the escrow account) and those of my customers (who hold equitable title to the funds). If interest is to be paid on the escrow account, I believe that the Fifth Amendment requires that the interest be paid to the owner of those funds. My customers are better served by keeping their funds in a non-interest-bearing escrow account; earnings credits granted by SeaTac's bank in connection with those funds allow the account to avoid having to pay for numerous services provided by the bank.

7. I also do not comply with APR 12.1 because I object to some of the activities engaged in by LFofW and by those to whom LFofW distributes IOLTA funds. I believe that requiring me to associate with the IOLTA program by requiring me and my company to establish an IOLTA account violates my rights under the First Amendment.

I state under penalties of perjury that based on my personal knowledge the foregoing is true.

s/DENNIS DAUGS
Dennis H. Daugs

Dated: November 3, 1997

DECLARATION OF L. DIAN MAXWELL

1. I, L. Dian Maxwell, am over 18 years of age, and am competent to testify about the matters set forth herein. I make this declaration in support of Plaintiffs' Motion for Summary Judgment.

2. I am employed by Pacific Northwest Title Company of Washington, Inc. ("PNW Title"), a company that, among other things, provides escrow services to buyers and sellers in connection with real estate transactions. Incidental to my job responsibilities as an escrow officer, I selected and filled in blanks on pre-approved form legal documents necessary to effectuate the transfer of title to real estate from a seller to a purchaser; I was authorized to select and fill in such documents by virtue of being licensed as an LPO ("Limited Practice Officer") by the Supreme Court of Washington. Although the selecting and filling in of form legal documents is a necessary component of the real estate closing process, those activities in fact never constituted more than a negligible portion of the time that I spent on behalf of escrow customers.

3. In late 1995, the Supreme Court of Washington adopted APR 12(h) and 12.1 in order to make LPOs (and companies employing the services of LPOs) subject to the IOLTA program. In response to that action, PNW Title determined that it would no longer employ LPOs in order to avoid the costs of complying with APR 12(h) and 12.1 and to protect the constitutional rights of its customers. I was told by others at PNW Title that those compliance costs would increase the cost of the average escrow transaction by $50.00.

4. In the fall of 1996, PNW Title informed me and other LPOs employed by PNW Title that, if we wished to continue to be employed by PNW Title, we would be required to surrender our licenses as LPOs. Recognizing that there were extremely few positions comparable to mine within the escrow industry, I responded by surrendering my LPO license on November 27, 1996. As a result, I am no longer permitted to practice my profession fully, and to select and fill in the legal documents that I am fully qualified to select and fill in.

5. PNW Title's customers must now make arrangements to hire their own attorneys to perform the document-drafting work formerly performed by PNW Title's LPO's.

I state under penalties of perjury that based on my personal knowledge the foregoing is true.

S/ L. DIAN MAXWELL
L. Dian Maxwell

Dated: November 3, 1997

DECLARATION OF NICHOLAS GELLERT

I, Nicholas Gellert, declare as follows under penalty of perjury:

1. I am an attorney at Perkins Coie representing defendants Legal Foundation of Washington and Kevin F. Kelly (collectively "LFW"). I have personal knowledge of the matters set forth herein.

2. Exhibits 1 and 2 hereto are true and correct copies of documents produced by plaintiff Dennis H. Daugs herein in response to LFW's discovery requests and marked as Exhibits 1 and 2 to the October 15, 1997, deposition of Mr. Daugs in this matter. At his deposition, Mr. Daugs identified Exhibit 1 as the most current version of the contract between the bank and SeaTac Escrow. He identified Exhibit 2 as the most current version of the contract between the bank and SeaTac Systems. Daugs deposition at 26. He further testified that these documents set forth all the terms of those agreements. Id. at 27.

3. Attached hereto as Exhibit 3 is a true and correct copy of an April 26, 1994 letter produced herein by plaintiffs in response to LFW's discovery requests.

4. Finally, attached hereto are true and correct copies of the pages of the transcripts of the following depositions cited in the Memorandum in Support of Legal Foundation of Washington's Motion for Summary Judgment and in paragraph 2 of this Declaration.

Exhibit 4. Dennis H. Daugs (October 15, 1997)

Exhibit 5. L. Dian Maxwell (October 16, 1997)

Exhibit 6. Gregory Hayes (October 16, 1997)

Exhibit 7. Allen D. Brown (October 20, 1997)

SIGNED, under penalty of perjury of the laws of the United States and the State of Washington, this 5th day of November, 1997, in Seattle, Washington.

s/ NICHOLAS GELLERT
Nicholas Gellert

Exhibit 1 to Declaration of Nicholas Gellert

CUSTOMER AGREEMENT
ESCROW ACCOUNT SERVICES

THIS AGREEMENT is made effective on the ____ day of _____, 19___ by and between COLUMBIA STATE BANK ("Bank") and the customer ("Customer") whose name and address appear below:

SeaTac Escrow Inc.
Name
2016 South 320th, Suite L
Address
Federal Way, WA 98003
City, State, Zip Code

_____
Contact Person/Telephone Number

RECITALS

A. Customer is in the business of serving as an escrow agent and/or holding assets of its clients which services require the performance of certain accounting reconciliation, documentation, escrow closing and other related services (collectively, the "Services").

B. Bank does not provide such Services to its Customers; however, Bank desires to make such Services available to Customer through a third party provider ("Provider") under contract with Bank.

NOW, THEREFORE, in consideration of the mutual promises set forth herein, the parties agree as follows:

AGREEMENT

1. Services. Bank agrees to arrange with Provider to perform Services on behalf of Customer and to pay Provider for such Services, and Customer agrees to accept and reimburse Bank for such Services in accordance with the terms of this Agreement. The Services [that] shall be provided to Customer will include those specific Services set forth on the "Schedule of Services and Fees" appearing as Exhibit A attached hereto. Notwithstanding, Customer acknowledges and agrees that Bank's obligations under this Agreement are expressly conditioned upon Provider's acceptance of Customer and this Customer Agreement.

2. Term. Subject to the Termination provisions herein, the term of this Agreement shall run for one year, beginning on the date first above written.

3. Voluntary Termination; Automatic Termination; Notice. This Agreement may be terminated voluntarily by either party upon 30 days written notice to the other. This Agreement shall also terminate automatically upon the happening of either of the following events: (i) Customer's account with Bank is closed for any reason, or (ii) the agreement between Bank and Provider (the "Provider Agreement") is terminated for any reason, unless a substitute Provider is agreed to by Customer and Bank. Promptly following any automatic termination, Bank agrees to provide Customer with written notice thereof. Notwithstanding, however, no termination of this Agreement or the Provider Agreement shall relieve Customer of any duties to reimburse Bank for any Service Fees (as defined in Section 4 below) accruing prior to the date of such termination.

4. Service Fees; Reimbursement. Bank has made arrangements with Provider pursuant to which Bank will pay Provider for all Services rendered to Customer under this Agreement. Customer agrees to reimburse Bank for such payments in the manner set forth in Section 5 below. Customer acknowledges and agrees that the fees to be reimbursed by Customer hereunder (hereinafter "Service Fees") as set forth on the attached "Schedule of Services and Fees" do not include the cost of standard banking services and supplies, which include, but are not limited to, checks, drafts, deposit slips and other forms and supplies, and Customer agrees to pay for such standard banking services and supplies separately in accordance with Bank's normal fee schedule.

5. Payment of Fees; Credits. Customer shall reimburse Bank for Service Fees paid by Bank either (i) in cash, (ii) by earning sufficient Credits (as defined below) to offset such Service Fees, or (iii) in a combination thereof.

a. Credits. Customer shall earn Credits each month based upon the average collected balances in Customer's designated account with Bank. Credits are calculated as follows:

(1) Calculation. Bank shall calculate Customer's average collected balance for each month (determined in accordance with Bank's normal check collection schedule). From this balance, Bank shall subtract an amount equal to the required reserves for Customer's account as required by Federal Reserve regulations. The result is then multiplied by the Earnings Credit Rate (equal to the average weekly discount rate for 13 week Treasury Bills

auctioned during the preceding month, as published by the Federal Reserve Bank of San Francisco), then divided by the number of days in the calendar year. The result shall equal the Credit value for one day, which is then multiplied by the number of days in the month to arrive at the Credit value for the month.

(2) Example. By way of example, if Customer had an average collected balance of $300,000 in the month of July during a non-leap year and the Earnings Credit Rate for June was 3.663%, Customer's Credit would be calculated as follows:

	$300,000.00	Collected Balance
-	$30,000.00	Less 10% Reserve Requirements
	$270,000.00	
x	.03663	Earnings Credit Rate for June
	$9,890.10	
÷	365	Number of days in calendar year
	$27.10	
x	31	Number of days in month
	$839.98	Total Credit for July

b. Insufficient Credit; Credit Surplus. In the event that Customer fails to earn or accumulate sufficient Credit to offset any Service Fees which are due and payable to Bank, Bank shall either debit Customer's account for any Service Fees due or issue an invoice to Customer for such Service Fees, in which case Customer shall pay to Bank the entire amount invoiced within ten days of receipt of such invoice. Surplus credit shall not accumulate from month to month, and any Credits earned during any one month in excess of those

required to offset Service Fees incurred during such month shall be canceled.

c. Nature of Credit. Credit earned by Customer shall be used exclusively to offset Service Fees incurred pursuant to this Agreement and may not be applied to offset any other fees or charges imposed by Bank. Credit shall be non-transferable, and shall not be considered, nor convertible into, cash or any other thing of value.

6. Bank's Relationship with Provider. Customer acknowledges that the Services offered in connection with this Agreement are provided as a function of a special escrow accounting system provided by and under the exclusive control of Provider. Bank's sole function under this Agreement is to act as the depository for Customer's funds in accordance with Bank's normal banking practices. Provider is an independent contractor providing services over which Bank has no power to supervise, direct or otherwise regulate. Provider is not an agent of Bank and has no authority whatsoever to create any obligations binding on Bank or to represent the Bank in any manner. Performance of the Services contemplated by this Agreement shall be the sole responsibility of Provider, and Bank shall not perform or participate in the performance of any such Services. Nothing in this Agreement shall create or extend any obligation, liability or duty of Bank or Customer to any other person or entity pursuant to any other contract, agreement (including the Provider Agreement) or relationship between Bank or Customer and such person.

7. Effect on Account Agreement. Customer and Bank acknowledge and agree that this Agreement shall supplement Bank's existing rules and regulations governing deposit

accounts as well as any other agreements between Customer and Bank with respect to such accounts. Except as specifically amended or modified hereby, such rules, regulations and requirements shall remain in full force and effect.

8. Communication. Any questions or correspondence relating to the Services to be provided hereunder should be directed to Provider at the address set forth below:

SeaTac Escrow Inc.
Provider's Name
2016 South 320th, Suite L
Address
Federal Way, WA 98003
City, State, Zip Code

_____
Contact Person/Telephone Number

All matters relating to Customer's account with Bank or any Banking transaction should be directed to Bank at the address set forth in Section 11 below.

9. Compliance with Regulation Q. Customer hereby represents and warrants to Bank that Customer is not a subsidiary of Provider and that Customer is not a party to any arrangement with Provider through which Customer will receive, directly or indirectly, payments of money or other things of value resulting from Customer's execution and performance of this Agreement. Customer shall indemnify, defend and hold Bank harmless from and against any loss or damage suffered by Bank as a result of Customer's violation of this warranty.

10. Miscellaneous.

a. Attorneys Fees. In the event of any legal action, including, without limitation, arbitration or the filing of a lawsuit to enforce any of the terms of this Agreement, the prevailing party (as determined by the court or arbitrator) shall be entitled to an award of all costs, including reasonable attorneys fees, incurred in such action, including those costs and fees incurred on appeal.

b. Governing Law; Venue. This Agreement and any interpretation thereof shall be governed by and interpreted in accordance with the laws of the State of Washington, and any legal action by either party in connection with this Agreement shall be brought in Pierce County, Washington, or such other venue as the parties may agree.

c. Notices. Any notices required under this Agreement shall be in writing and sent, in the case of Provider, to the address appearing on the first page of this Agreement, and in the case of Bank, to the following address:

Columbia Bank
1102 Broadway Plaza
Tacoma, Washington 98401
Attn: Cash Management

d. Entire Agreement. This Agreement constitutes the entire agreement between the parties.

e. Successors; Assignment. This agreement shall be binding on the parties, their successors and assigns. This

Agreement may not be assigned by either party without the express, written consent of the other party.

f. Amendments. No amendments to this Agreement shall be of any force and effect unless in writing and executed by the parties hereto.

IN WITNESS WHEREOF, the parties have executed this Agreement effective on the date first above written.

BANK:	**CUSTOMER:**
COLUMBIA STATE BANK	**SEATAC ESCROW, INC.**
By /s/	By */s/ Nina M. Daugs*
Its VP	Its President

Exhibit 2 to Declaration of Nicholas Gellert

PROVIDER AGREEMENT
ESCROW ACCOUNT SERVICES

THIS AGREEMENT is made effective on the _____ day of _____, 19___ by and between COLUMBIA STATE BANK ("Bank") and the account services provider ("Provider") whose name and address appears below:

SeaTac Systems Inc.
Name
2016 South 320th, Suite L
Address
Federal Way, WA 98003
City, State, Zip Code

_____
Contact Person/Telephone Number

RECITALS

A. Provider is in the business of providing accounting, reconciliation, documentation, escrow closing and other related services (collectively, the "Services") to escrow companies and other businesses.

B. Bank does not offer such Services to its customers; however, Bank desires to make the Services available to those escrow companies and certain other businesses which are customers of Bank.

NOW, THEREFORE, in consideration of the mutual promises set forth herein, the parties agree as follows:

AGREEMENT

1. Services. Provider agrees to provide the Services to Customers (as defined below) on behalf of Bank, and Bank agrees to pay Provider for the Services pursuant to the terms and conditions of this Agreement. The Services shall be provided to Customers in accordance with Provider's standard operating procedures and shall include those specific Services set forth on the "Schedule of Services and Fees" appearing as Exhibit A attached hereto.

2. Term. The term of this Agreement shall commence on the date first above written and shall continue until terminated by either party upon thirty days written notice to the other.

3. Definition of "Customers"; Customer Agreements; Termination. As used in this Agreement, the term "Customers" shall mean those escrow companies and other businesses who (i) have been approved in advance by Provider; (ii) maintain an account with Bank, and (iii) have entered into an agreement ("Customer Agreement") with Bank covering the provision of and payment for Services, which agreement shall be substantially in the form attached hereto as Exhibit B. A Customer shall immediately cease to eligible for the Services offered by Provider upon Customer's failure to maintain such an account or upon any termination of the Customer Agreement, and upon the happening of either event Bank agrees to provide prompt notice thereof to Provider.

4. Compensation; Invoices. Bank agrees to pay Provider in accordance with the attached Schedule of Services and Fees for the services Provider performs on behalf of

Customers. Provider shall submit monthly invoices for Services so provided, and Bank agrees to remit payment for such Services within 30 days following its receipt and approval of such invoice.

5. Independent Contractor Status. The parties hereby acknowledge and agree that Provider is an independent contractor and that Bank has no power to supervise, direct or otherwise regulate Provider, its agents or employees in the performance of the Services hereunder. Provider is not an agent of Bank and shall have no authority whatsoever to create any obligations binding on the Bank or to represent the Bank in any manner. Performance of the Services contemplated by this Agreement shall be the sole responsibility of Provider, and Bank shall not perform or participate in the performance of any such Services.

6. Indemnification; Third Parties. Provider shall indemnify, defend and hold Bank harmless from and against any loss, damage or claims of any kind or nature (including attorneys fees), whether asserted by a Customer or any other person, arising out of or with respect to Services performed by Provider, irrespective of whether such Services are within the scope of those contemplated by this Agreement. Nothing in this Agreement shall create or extend any obligation, liability or duty of Bank or Provider to any other person or entity pursuant to any other contract,. agreement (including a Customer Agreement) or relationship between Bank or Provider and such person.

7. Compliance with Regulation Q. Provider hereby represents and warrants to Bank that Provider is not a subsidiary of any Customer and that Provider is not a party

to any arrangement with any Customer through which such customer will receive, directly or indirectly, payments of money or other things of value resulting from such Customer's execution and performance of the Customer Agreement.

8. Examinations; Audits. In the event of an examination or audit of the Bank by any regulatory agency, Provider agrees to provide such information to and cooperate with such agency as may be required by Bank.

9. Miscellaneous.

a. Attorneys Fees. In the event of any legal action, including, without limitation, arbitration or the filing of a lawsuit to enforce any of the terms of this Agreement, the prevailing party (as determined by the court or arbitrator) shall be entitled to an award of all costs, including reasonable attorneys fees, incurred in such action, including those costs and fees incurred on appeal.

b. Governing Law; Venue. This Agreement and any interpretation thereof shall be governed by and interpreted in accordance with the laws of the State of Washington, and any legal action by either party in connection with this Agreement shall be brought in Pierce County, Washington, or such other venue as the parties may agree.

c. Notices. Any notices required under this Agreement shall be in writing and sent, in the case of Provider, to the address appearing on the first page of this Agreement, and in the case of Bank, to the following address:

Columbia Bank
1102 Broadway Plaza
Tacoma, Washington 98401
Attn: Cash Management

d. Entire Agreement. This Agreement constitutes the entire agreement between the parties.

e. Successors; Assignment. This agreement shall be binding on the parties, their successors and assigns. This Agreement may not be assigned by either party without the express, written consent of the other party.

f. Amendments. No amendment to this Agreement shall be of any force and effect unless in writing and executed by the parties hereto.

IN WITNESS WHEREOF, the parties have executed this Agreement effective on the date first above written.

BANK:	PROVIDER:
COLUMBIA STATE BANK	Seatac Systems, Inc.
By: /s/	By /s/ Dennis H. Daugs
Its V.P.	Its President

List of Exhibits:

Exhibit A	Schedule of Services and Fees
Exhibit B	Customer Agreement Form

EXHIBIT A [to the Provider Agreement]
SCHEDULE OF SERVICES AND FEES

Bank agrees to pay SeaTac Systems Inc. each month a fee based on 3.5% of the customer's average monthly collected balances divided by 365 days in the year and then multiplied by the number of days in the month, as consideration for the automated escrow accounting services to be provided to customer.

EXHIBIT B [to the Provider Agreement]
CUSTOMER AGREEMENT FORM

[Blank]

Exhibit 3 to Declaration of Nicholas Gellert

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D.C. 20551

ADDRESS OFFICIAL CORRESPONDENCE
TO THE BOARD

April 26, 1994

Mr. Gerald R. Wheeler
Certified Public Accountant
33749-A 9th Ave. S.
Federal Way, WA 98003

Dear Mr. Wheeler:

This is in response to your letter of March 15, 1994 requesting guidance with respect to payment of interest on demand deposits of escrow companies in light of the letter of March 9, 1994 from the Federal Reserve Bank of San Francisco. That letter found a particular practice involving deposits by escrow companies to be in violation of Regulation Q (12 C.F.R. 217), which prohibits the payment of interest on demand deposits. This practice involved payments by a bank to wholly owned subsidiaries of title and escrow companies where the title and escrow companies held demand deposits at the bank. Although the subsidiaries provided account related services to their parent title and escrow companies that could have been provided by the bank, because these subsidiaries were not in the business of providing such services generally and because they were wholly owned subsidiaries of bank customers holding demand

deposits, board staff concluded that this practice amounted to the payment of interest on demand deposits.

Your letter raises four questions. First, if the service company is an affiliate of the title and escrow company other than a subsidiary, will the payments still be imputed to the depositor? Second, what are normal banking services? Third, if the bank and/or the service provider calculate(s) an earnings credit based on the deposit balances and short term interest rates, does this in itself cause a violation of Regulation Q? Fourth, if the service companies have no revenue for their services other than from banks pursuant to earnings credits, does this invalidate their claim that their services are provided for value?

As noted in the Federal Reserve Bank of San Francisco's letter, Regulation Q states:

> No member bank of the Federal Reserve System shall, directly or indirectly, by any device whatsoever, pay any interest on any demand deposit.

12 CFR 217.3 (footnote omitted). "Interest" is defined as:

> . . . any payment to or for the account of any depositor as compensation for the use of funds constituting a deposit. A member bank's absorption of expenses incident to providing a normal banking function or its forbearance from charging a fee in connection with such a service is not considered a payment of interest.

12 C.F.R. 217.2(d). A staff opinion points out that such absorption:

would not constitute the payment of interest, since the bank does not actually pay funds to the depositor, although the customer does benefit from the charges absorbed. This should be distinguished, however, from instances in which a rebate is actually paid to the customer based on a deposit balance maintained at the bank.

Staff Op. of Oct. 27, 1978 (I Fed. Res. Reg. Serv. 2-543).

With respect to your first question, payment to a wholly owned subsidiary of the depositor is imputed to the depositor because it is a direct financial benefit to the depositor. In a consolidated financial statement of the depositor and its subsidiary, a payment to the subsidiary is accounted for as a payment to the consolidated whole, and the depositor benefits from the payment whether made to it or to its subsidiary.[1] However, staff believes that payment to an affiliate of the depositor that is not a subsidiary does not constitute payment to or for the account of the depositor, as it is not a direct financial benefit to the depositor. Even if the affiliate is wholly owned by a person or company which wholly owns the depositor, the affiliate would not appear in a consolidated financial statement of the depositor, and payment to the affiliate would not benefit the depositor, although it would benefit the owner of the depositor. (A rebate of any portion

[1] The imputation to the depositor of a payment to its subsidiary by a bank does not, by itself, constitute a violation of Regulation Q. If the subsidiary is in the business of providing these services to others generally on the same terms, then the payments may not be "compensation for the use of . . . a deposit." See the discussion of your third and fourth questions below.

of a payment to the customer or a subsidiary thereof could lead to a different result.)

With regard to normal banking functions or services, the Board has in the past considered the provision, inter alia, of the following services without charge in the context of municipal deposits to be normal banking services the provision of which do not constitute payment of interest: processing of shipping and insurance in connection with transfers on collections of municipal bonds or coupons, preparation of reports, maintenance of a permanent record of checks and deposits, and operation of a state's warrant processing and reconciliation system. Staff Op. of Jan 3, 1974 (I Fed. Res. Reg. Serv. 2-540).

In the context of deposits by title and escrow companies, you inquired about:

- automated escrow closing trust accounting and bank reconciliation;
- monthly general ledger and financial statements pertaining specifically to escrow accounting service (including FDIC requirements where appropriate);
- tax reporting;
- IRS information returns;
- courier and messenger service expense;
- forms and miscellaneous supplies;
- telefax and xeroxing charges.

Staff believes that in the context of deposits by title and escrow companies, these services may be regarded as normal banking functions for which the bank may absorb the expenses.

With regard to your third and fourth questions, in the context of services provided by subsidiaries or other affiliates of title and escrow company depositors, staff believes that the pricing of these services is of limited significance. Where the service is provided by a wholly owned subsidiary of the depositor, payments to the subsidiary should be viewed as payment of interest on the parent's deposit, regardless of amount, unless the subsidiary is in the business of providing these services to others generally. In that case, however, the amount of the payments becomes relevant as excess payments to the subsidiary could result in payment of interest on the parent's demand deposit.

We hope this letter will be helpful to you and the banks you work with in avoiding violations of Regulation Q. Further questions may be addressed to J. Ericson Heyke III (202-452-3688) or Oliver Ireland (202-452-3625) at the Board of Governors or to Robert D. Mulford (415-974-2256) at the Federal Reserve Bank of San Francisco.

Very truly yours,

/s/
Oliver Ireland
Associate General Counsel

Exhibit 4 to the Declaration of Nicholas Gellert

EXCERPTS OF DEPOSITION OF
PETITIONER DENNIS H. DAUGS
October 15, 1997

Page 6 of Deposition Transcript

Q How long did you sell real estate?
A I sold and managed real estate until about '86, I guess.

Q Then what did you do in 1986?
A In 1986 my wife wanted to open her own escrow company so I went over to help her and I've been there ever since.

Q What's your wife's name?
A Nina.

Q Also Daugs?
A Daugs, yes, Nina Marie Daugs, officially.

Q Had she been in the escrow business prior to wanting to open her own company?
A Yes.

Q For how long had she been in the business prior to 1986?
A She came up to Washington in '79, approximately, prior to that she was in the escrow business in California for a whole bunch of years. She's been in the escrow business, let's see, somewhere around 26, 27, 28 years.

* * *

Pages 24-27

Q Do you know whether the Columbia State Bank pays the same rate of interest on the IOLTA account as it does on the specific clients interest bearing accounts?
A I don't know.

Q Do you have any relationship with any accounting service?
A I've got an accountant.

Q In-house?
A No, I have an outside accountant that does my taxes for me.

Q Do you have an outside accountant who does accounting services for your clients' funds?
A No.

Q Does Columbia State Bank do that for you?
A No.

Q Do you do that in-house?
A I have a separate company that does that accounting, yes.

Q What's that company called?
A SeaTac Systems, Inc.

Q When was that corporation created?
A '86, '87.

Q What business is that entity in?
A It provides computer services and accounting services.

Q Who owns SeaTac Systems, Inc.?
A My wife and I.

Q And how many employees does SeaTac Systems, Inc. currently have?
A My wife and I.

Q What, if any, contractual agreements are in place currently between SeaTac Systems, Inc. and SeaTac Escrow?
A SeaTac Systems provides trust accounting services for SeaTac Escrow on their trust account, SeaTac Systems owns the computers that SeaTac Escrow operates on.

Q Are there written contractual agreements between the two entities?

A Well we have the contractual agreements through Columbia Bank that describe how SeaTac Systems will provide the accounting work.

Q Did SeaTac Systems provide services for any entities or persons other than SeaTac Escrow?
A Not currently. I've at times thought about promoting that service for other companies but I've never obtained any other clients other than SeaTac Escrow. I had looked into providing document preparation for some companies, for some mortgage companies at one time and it never came off.

Q So if I understand this correctly there is an agreement between Columbia State Bank and SeaTac Systems and there is an agreement between Columbia State Bank and SeaTac Escrow but there isn't an agreement between SeaTac Systems and SeaTac Escrow?

A At this point there isn't a written one, no. If I was providing that service for another company obviously I would have something in writing, since I'm talking to myself I figure I can understand what I'm saying to myself.

Q Did SeaTac Escrow have a similar contract with Key Bank as it now has with Columbia?
A Yes.

(Exhibit No. 1 - 2 marked)

Q Mr. Daugs, could you identify Exhibit Nos. 1 and 2 for us?
A This is the agreement with the bank for SeaTac Escrow and Exhibit No. 2 is the agreement with the bank for SeaTac Systems.

Q Are those the most current versions of those contracts?
A Yes.

Q Were there previously any different versions of the agreements between SeaTac Escrow and the bank or between the bank and SeaTac Systems?
A No.

Q As far as you know does Exhibit No. 1 set forth all the terms of the business relationship between the bank and SeaTac Escrow?
A Yes.

Q As far as you know does Exhibit No. 2 set forth all the terms of the agreement between SeaTac Systems and Columbia Bank?
A Yes.

Q Since entering these agreements has there ever been a time when you did not have a sufficient average balance to accumulate enough credits to pay for the accounting services provided by SeaTac Systems?
A No, not at this -- under the current situation. There was a time prior, in my prior association where when the interest rates were terribly low back aways, yes, I was paying -- SeaTac Escrow was paying fees because there was not enough earnings allowance there.

* * *

Pages 36-39

Q Into the IOLTA trust account?
A No.

Q Which account?
A The SeaTac Escrow trust account.

Q Is that an interest earning account?
A No, it's a non-interest bearing account.

Q And when you get the funds from the bank loaning the money to the purchaser what do you do with those funds?
A Deposit them into the non-interest bearing SeaTac Escrow trust account.

Q Under what circumstances do you deposit funds into the IOLTA account?
A At this point never.

Q Have you ever put funds into the IOLTA account?
A No.

Q Why not?
A That's why we are here.

Q What fees does Seattle Escrow charge in a generic case for the closing on a residential real estate transaction?
A I don't know, I don't know what Seattle Escrow does.

Q I'm sorry, SeaTac Escrow.
A What fees?

Q Yes.
A We charge one fee.

Q What is that fee?
A It's dependent upon sales price.

Q How is it calculated?
A It's a $10,000 sliding scale with a minimum of $350.

Q How large a transaction does it have to be to exceed the $350 fee?

A To exceed, I didn't bring a rate chart. I'm thinking, I believe - I think the first break is $10,000, at $10,000.

Q So a transaction for more than $10,000?
A It would go up.

Q It would go up from $350?
A Right.

Q What's the increment for each $10,000 additional sale price?
A It's not a fixed increment. Basically, let's see, I'm trying to think how -- I believe its for the most part ten -- $10 -- $10 or $20 a transaction on every $10,000, for the most part, that's kind of the generic side, up to -- I think my chart goes to a million and then after that it's an arbitrary -- basically what I do is charge one dollar a thousand.

Q When is the last time you changed your rate structure, rate chart?
A I'm glad you asked me that, it's been August of 1993.

Q What were your rates prior to August of 1993?
A Just slightly -- slightly below that, as I recollect I think I raised -- I think I raised each category by $10 at that time.

Q And prior to August of 1993 when was the time previous to that that you altered your rate chart?

A Since we opened in '86 I believe there was one other time when I raised them twice and I tell you right now the only reason that I haven't raised them since '93 is because there is no way that I can stay in the marketplace because competition is very, very severe out there.

Q How do you decide at what level to set your rates?
A Ideally, okay, ideally I anticipate-- the last time I did this, okay, I anticipated a certain volume, determined to calculate my expenses and then put a little profit on top of it. And there are a lot of factors that go into that, employees, the amount of work that you can get out of an employee, the cost of that employee, and that's kind of the role that I go through when I try to determine that. However the market out there has eliminated that factor of being able to sit down and put it on a piece of paper and say, okay, I'm going to do this amount of business and when I do this amount of business I'm going to have that much profit. You have to throw that out the window and fight the competition is what is going on, okay, and that competition is a lot of factors, not just independent companies, independent companies are not my competition.

Q Who do you view as your competition?
A The major competition is title companies, and of course the next one are the mortgage companies themselves.

* * *

Q Does the purchaser who deposited funds with you receive any benefit for the earnings credit created by their short term deposit of funds?
A Sure, it holds the cost down.

Q How is that?
A Well if that offset of those bank charges, accounting charges was- - if that was not offset against those earnings allowances I would have to pass that cost on to the customer or go bankrupt.

Q How much profit did you make last year, SeaTac, how much profit did SeaTac Escrow make in profit?
A Gee, I was just looking at that, I think it was-- it's a subchapter S and I think it was-- the profit I think was like $35,000, do you want to know the year before?

Q Sure.
A Zero.

Q Did you lose any money?
A Didn't make a dime.

Q Did you draw a salary as one of the costs of SeaTac Escrow's business?
A Yes.

Q What was your salary last year?
A $30,000.

* * *

Q Did you pass that expense on to your clients in any way?

A No, I didn't adjust, no, I've never-- see, I have a different concept than a lot of people do, okay, I figure I provide a service for one fee and that's an all inclusive fee. I don't charge courier fees, I don't charge Federal Express fees, I don't charge any fees. I just charge one fee, and so at that time that was suck it up and eat it, you know. And that would be the situation if it was in reverse now-- if it was for any extended period of time I obviously would have to increase my rates or get out of the business.

Q Why do you need the accounting services provided by SeaTac Systems?

A It's a requirement that I keep-- it's under 18.44, it's a requirement that I keep in my custodial-- SeaTac Escrow in its custodial position as the holder of those funds in trust for the client is required to be able to identify those client's funds at any time and that's the service that SeaTac Systems provides.

* * *

Pages 62-64

Q So as far as you're concerned your relationship, your obligations to your clients is driven by what's set forth in the purchase and sale agreement?

A That's correct, that's what 18.44 says.

Q Have you ever been presented with a purchase and sale agreement in which you were instructed to deposit funds into an IOLTA account?

A No.

Q Have you ever been presented with a purchase and sale agreement where you were instructed specifically not to put the money into an IOLTA account?

A No.

Q Does the binder have certain disclosures in it that provide the clients discuss at all the earning credits system that you have?

A No, that's just one of those undisclosed benefits that they get.

Q What other undisclosed benefits, to use your words, does the customer get?

A Frequently Federal Express fees, courier fees, delivery fees, timely handling of documentation, those are all undisclosed benefits, sometimes we wave the flag, sometimes we don't. They get a friendly smile when they come in the door, they get an escrow officer that cares about their needs, those are all the undisclosed benefits, you don't always get that when you walk into a place but that's part of our reputation. I'm beating my own drum now, okay.

Q I understand that. Have you ever in your ten plus years experience doing this have you ever had clients put limitations on where they wanted their funds being held by you to be deposited?

A No.

Q In the ten plus years you've been doing this have you ever had a client communicate to you any limitations on what use they wanted their funds to be put?
A No.

MR. SAMP: Just to clarify when you're talking about limitations on where to be deposited you meant the name of the bank as opposed to whether it should be an interest bearing or a non-interest bearing account.
MR. GELLERT: Would your read back the last two questions. (Reporter reads back)

A My interpretation was the institution, that's what I thought you meant, institution.

Q Have you had any clients communicate to you opposition to their funds being deposited in an IOLTA account?
A No, because it's not a discussion I have with my customers.

Q Have you ever had any customers ask you whether their funds were being placed in an IOLTA account?
A No.

Q Do you know whether any of your clients would have opposed it if you had put their funds into an IOLTA account?
A Not having discussed the situation with any of my customers how could I know.

Q I just wanted to make sure.

Exhibit 5 to Declaration of Nicholas Gellert

EXCERPTS OF DEPOSITION OF
PETITIONER L. DIAN MAXWELL
October 16, 1997

Page 6 of Deposition Transcript

Q Also at Edmonds?
A Also at various community colleges, Shoreline, Bellevue Community College, North Seattle.

Q Did you complete the paralegal course?
A No, I did not.

Q Where are you currently employed?
A At Pacific Northwest Title Company of Washington.

Q That used to be Stewart Title?
A Correct.

Q How long have you been employed by Stewart Title and then Pacific Northwest Title?
A My hire date was 2/1/85.

Q What was your initial position there?
A Assistant escrow manager, escrow closer.

Q And you've received promotions from time to time over the last 12 years?
A Yes.

Q What's your current position?

A Executive vice-president.

Q For how long have you been executive vice-president?
A Approximately five years.

* * *

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A I surrendered it at that time to the Department of Licensing when I became employed at a title company.

Q Was Rainier Financial Services a title company?
A No.

Q So you surrendered it sometime around February of 1985?
A Yes, I actually don't remember, I think you can keep it— they keep it on inactive for like two years but it was turned in to the Department of Licensing.

Q Have you ever held any other licenses?
A Yes.

Q Which?
A I held a Limited Practice Officer certificate.

Q During what period did you hold that certificate?
A 1984 to November 30, 1996.

Q And you surrendered your license or certificate to be an LPO on about November 30, 1996?
A Yes.

Q Any other licenses that you've ever held?
A I'm a licensed notary public.
Q For what period of time have you been a licensed notary public?
A 1978 to current.

* * *

Page 18

MR. BRAIN: I'm not going to object but do you mean generically or individually?
Q Generically at this point.
MR. BRAIN: That might be a little easier for her to answer.
A I don't believe I personally have any clients.

Q You work for clients of Pacific Northwest Title?
A Yes.

Q Who are those clients for whom you work?
A They are principals to a written agreement, most commonly referred to as purchase and sale agreement, i.e., buyers and sellers of real estate or personal property. They are borrowers of funds from lending sources as well.

Q By that do you mean that some of those clients are not buyers or sellers but also include people who own property that are trying to get financing on that property?
A Restructuring of debt on that property, that's correct.

Q Currently about what percentage of your employer's clients are people seeking restructuring of debt on their property?
A The current economic times I would say 40 percent of our transactions are that type.

* * *

Pages 21-26

Q Is there a fixed scale for fees in commercial transactions?
A No.

Q Are you personally in charge of deciding what fee will be charged on a commercial transaction that you are working on?
A For the most part, yes.

Q How do you go about setting a fee in a commercial transaction?
A By analyzing the contract between the parties, discussions with their legal counsel, and an estimate of my time involvement.

Q How does the pricing of the property play a role in setting the fee?
A It's a standard that has existed among the industry and the state of Washington to set a minimum fee structure based on either the purchase price of the real or personal property or the loan amount with respect to restructuring of debt.

Q How are fees charged by Pacific Northwest Title determined for residential transactions?

A They are determined by the competitive marketplace and current economic conditions of the area.

Q What are the current fees charged by Pacific Northwest Title for closing a residential transaction?
A It's based on sales price, it's a variable.

Q A sliding scale?
A A sliding scale based on price.

Q What's the minimum?
A I think $500, total escrow fee.

Q Is that broken down at all?
A It's traditionally split between the purchaser and seller of a sale transaction, 50/50, which is pursuant to their written contract.

Q But are the elements of the $500 total broken down at all?
A No.

Q Does that include title insurance?
A No.

Q What does that fee go toward?
A The cost of overhead to operate the escrow division and hopefully profit.

Q What do the parties to the purchase and sale agreement get for the payment of the escrow fee?
A They are provided with a neutral third party to hold documents, funds. They are provided with the

coordination of a neutral third party to clear matters for which are objected to in a title insurance commitment. They are provided with closing statements which reflects costs, third party charges and appropriate prorations between the parties. They are provided with a safe harbor, the deposit of their funds necessary to convey ownership and to disburse proceeds to the owner, and they are provided a guarantee that those funds are used to pay off liens and obtain releases to clear the title to the property being conveyed. They are provided the service of producing recording and policy instructions pursuant to third party instructions or escrow instructions to be forwarded to the title company to record the instruments and anything else that the parties may want.

Q When you say "anything else the parties may want", you mean anything else that the parties included in the purchase and sale agreement as instructions to you?
A That's correct, or mutually-- or subsequently mutually agreed to do, that would be a duty of mine to follow through and see that it is done.

Q Do you enter or does Pacific Northwest Title enter a written agreement with the parties to the purchase and sale agreement?
A Yes.

Q What are those agreements usually called?
A Joint escrow instructions.

Q At what dollar value does a real estate transaction get charged more than the $500 current minimum?

A We have a published minimum fee schedule rate.

Q You don't recall sitting here today at what point it gets above that number?
A I do not.
Q When is the last time Pacific Northwest Title changed its fee structures for residential transactions?
MR. BRAIN: I presume you mean escrow fee structures as opposed to title structures.
Q We'll start there, yes.
A September, 1997.

Q At that time did you increase or decrease the rates?
A We decreased them.

Q Why?
A Comparative analysis of the rates in the industry.

Q And when was the time previous to that that Pacific Northwest Title or its predecessor, Stewart Title-- when was the name changed?
A It became effective January 1st, 1997.

Q When was the time most recently prior to September '97 that your employer changed its rates for escrow closing fees?
A To the best of my current knowledge there was a rate change in 1996.

Q Was that an increase or decrease, do you remember?
A That was an increase.

Q Why were rates increased at that point?

A Current competitive analysis of the marketplace and the industry at the time.

Q Do you know whether the recent decrease in rates has put the rates at a level that they were prior to the increase in 1996?
A Would you repeat that question.

Q You said the rates increased at some point in '96 but recently in September of '97 they decreased. I was wondering whether the decrease now has the rates back to a level at or below where they were prior to the 1996 increase.
A For the most part they are back to what they were before the increase. There may be a category, price category that's $2 different but for the most part it was a rescinding of the increase.

Q Do you recall when the previous rate change prior to the 1996 increase was?
A I believe it was 1993.

Q Was that an increase or decrease?
A I don't remember.

Q Was that again as a result of the analysis of your competitors' pricing?
A Yes.

Q Do you charge a different escrow fee depending on whether or not Pacific Northwest Title is going to be underwriting the title insurance?
A No.

Q Do you do escrow closings and transactions where Pacific Northwest Title is not going to be the title insurance company?
A Yes.

Q Is that done very often?
A No. I need to clarify.

Q Okay.

* * *

Pages 30-36

Q With which financial institution is that account currently?
A Seattle First National Bank.

Q I take it from seeing some documents that Pacific Northwest Title no longer has any LPOs in its employment, is that correct?
A That's correct.

Q While Pacific Northwest Title did still have LPOs in its employment did it have any other trust accounts other than the dedicated escrow trust accounts that you've already referenced?
A I don't remember the structure. When I was an LPO and IOLTA became effective there was an IOLTA trust account established wherein I, as well as the other limited practice officers employed by our company, were on that account. Whether or not the company was the owner of that account or just an addressee of that account I don't remember.

Q When IOLTA became effective to LPOs in the passage of APR 12.1, did at any time you leave your employment of Stewart Title and Pacific Northwest Title?
A No.

Q If I understand correctly you think that the IOLTA trust account may have been set up in such a way that it was an account essentially owned by the LPOs that worked for Pacific Northwest Title?
A No, it's very difficult to explain. There was published, I believe, and I don't even know from where, either the Limited Practice Board or copies of documents from your organization that you represent, a mechanism wherein there could be an umbrella IOLTA trust account as opposed to every LPO being required to have their own trust account. So when it became effective in '95, without rules and regulations or structure in existence, for cost effectiveness we established an umbrella IOLTA trust account as opposed to 26 IOLTA trust accounts. For protection of the consumers' money general accounting principles were applied wherein the company's accounting department was responsible for the bank reconciliations for review, so where I as an LPO had no control over bank reconciliations, et cetera, I was singularly responsible for placing funds into the IOLTA account and removing it. And the officers of the corporation as far as non-escrow officers but corporate officers in the accounting department did not have the authority to go in and move money. They were, the cross check, the gap cross check, they did the reconciliations, they worked with SeaFirst, a different

division of SeaFirst for IOLTA on the reconciliation of that account.

Q Maybe that answers my next question, the IOLTA trust account was also with SeaFirst?
A Yes.

Q Does that IOLTA trust account still exist?
A I don't know.

Q On the non-IOLTA account, the dedicated trust account that you referenced before, was there any agreement with the bank in place to receive what I've seen referred to as earnings credits?
A To whom?

Q To anybody.
A I have no direct knowledge. It is my impression that there was an agreement between a subsidiary of the holding company and the bank with respect to earnings credits.

Q When you said the holding company, who's the holding company?
A It's the parent company of Pacific Northwest Title of Washington, Inc.

Q What's the holding company's name?
A Pacific Northwest Title Holding Company.

Q What's the name of the subsidiary that you believe may have had that agreement with the bank?
A Title Optics, Inc.

Q Have you ever seen any contracts between Title Optics, Inc. and SeaFirst?
A No.

MR. GELLERT: Off the record. (Brief recess taken)
MR. GELLERT: Back on the record.

Q Prior to the whole change-- when Stewart Title was still the entity was there also a holding company and then the title company?
A Yes.

Q And at that time did Title Optics exist?
A Yes.

Q Was Title Optics at that time a subsidiary of the holding company?
A Yes.

Q And at that time was there also to your understanding some type of agreement between SeaFirst Bank and Title Optics whereby earnings credits or something to that effect was earned on the trust account?
A I believe so, I have no evidence to that effect.

Q Do you have any knowledge of the terms of any agreement between SeaFirst and Title Optics?
A No.

Q Do you know whether any earnings credits were available to be earned on the IOLTA trust account that was established for SeaFirst?
A No.

Q You don't know one way or the other?
A I don't know one way or the other.

Q Do you know what rate of interest SeaFirst gave on the IOLTA trust account?
A No.

Q Who do you believe would be most knowledgeable about the relationship with Seafirst with respect to the IOLTA trust account?
A The chief financial operations manager- - financial officer, Jim Gill, G - i - l - l .

Q And Mr. Gill also would be the one most knowledgeable concerning the relationship between SeaFirst and Title Optics?
A Yes.

Q When you did operate as an LPO employed by Pacific Northwest Title or Stewart Title did you have any clients of your own as opposed to clients of your employer?
A I need you to define your term clients I guess.

Q Do you consider that you had any contractual agreements personally with any of those that you were closing transactions for while employed by Pacific Northwest Title or Stewart Title?
A No. I'm having a hard time with the structure of your question because I have a following of people who like to use me for closing their escrow transactions because of the service and the expertise I feel they feel that I give them in order to close the transaction well and

quickly and correctly, but it's not contractual, it is a business relationship that exists as long as I continue to do my job well.

Q Your job well as an employee of?
A As an escrow officer.

Q As an escrow officer employed by Pacific Northwest Title?
A Yes.

Q Following the passage of APR 12.1 while you were still an LPO were any additional fees charged to clients on the closing of a residential transaction?
A Yes.

Q What were those fees?
A The clients to the transaction were assessed a fee that we called a trust accounting fee.

Q When did Pacific Northwest Title first charge a trust accounting fee?
A That fee was initiated as a result of an analysis of the cost of maintenance of an IOLTA trust account.

Q Who made that analysis?
A The company.

Q Who at the company, do you know?
A Well Jim Gill was involved, Pete Murphy, who was the CEO of the holding company, I was involved, my assistant manager was involved.

Q Who was that?
A Cheryl Ford-- involved in the meeting. There may have been others present, I don't remember.

Q And when was that process of deciding what the cost of maintenance of an IOLTA account, when did that take place, that process?
A It would have been in '95, 1995, the effective date of the IOLTA 12.1.

* * *

Pages 41-42

Q Are you aware of any other activities done as part of analyzing what the cost of maintaining the IOLTA account?
A No.

Q When did Pacific Northwest Title first start charging a trust accounting fee?
A To the best of my recollection that was instituted in the fourth quarter of 1995, it would have been at the same time that the IOLTA trust account was established and that IOLTA became applicable to LPOs, so don't hold me to the date but it would have been all connected.

Q And was the trust accounting fee a flat fee regardless of the dollars involved in a transaction?
A Yes, it was.

Q What was the flat fee initially?
A $50 per file split 50/50 between the parties.

Q Are trust accounting fees still charged on any transactions?
A No.

Q Have they been charged on any transactions since November of 1996?
A No.

Q At any time between when they were first being charged and November of 1996 did the flat fee change from $50?
A No.

Q Did you ever waive the trust accounting fee?
A We may have.

Q Under what circumstances?
A Refusal of clients to pay.

Q Did any of your clients refuse to pay?
A Yes.

Q How many?
A Minimal.

Q Can you put a number on it?
A Under ten.

Q How many of your clients or clients of Pacific Northwest Title for whose accounts you were working did you charge a trust accounting fee?

A Any file in which I prepared legal documents necessary to close the escrow transaction they were charged the trust accounting fee.

Q Can you tell me how many that was?
A I cannot.

Q Was it more than 100?
A Yes.

* * *

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Q Who was that counsel, in-house counsel?
A No.

Q Who was the lawyer?
A Foster Pepper.

Q Was opposition by clients or prospective clients to paying the trust accounting fee a consideration in a decision to terminate having LPOs at Pacific Northwest Title?
A No.

Q Currently now that there aren't LPOs at Pacific Northwest Title for residential transactions who prepares the legal documents?
A Parties to the transaction select their own counsel and the documents are submitted into escrow.

Q Do you play any role in assisting the parties to select counsel?

A Yes.

Q What role do you play?
A We advise them of two law firms that agree to prepare documents for a fee, we advise them that they can also prepare their own documents. We advise them that they have their own legal representation their own attorneys prepare them.

* * *

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Q I understand, okay. Do you know whether Ryan Swanson is employing LPOs to do this work?
A I do not.

Q Do you know whether Pacific Northwest Title considered having LPOs as independent contractors do it?
A We did not. We can't be independent contractors, that was a major, major discussion point in the creation of APR 12. The fear was that we were limited, extremely limited in our duties and authority and could not quote-unquote hang a shingle on the corner as a limited practice officer. It had to be in conjunction with an escrow transaction in which we were closing a real personal property transaction.

Q I take it, correct me if I'm wrong, that now that Pacific Northwest Title does not have LPOs funds being held by Pacific Northwest Title as part of a residential real estate transaction they are put into what you referred to as the dedicated escrow account?
A That's correct.

Q Does that account earn interest, I take it not?
A No.

* * *

Pages 57-58

Q The money isn't considered available to SeaFirst to earn interest?
A Exactly.

Q While you still did have your LPO license and were depositing funds into the IOLTA account did you ever have any clients communicate to you opposition to their funds being placed into the IOLTA account?
A I know I remember one.

Q Who was that?
A Mr. Bob Parks.

Q P-a-r-k-s?
A Yes.

Q When was that?
A During the period that it was applicable, I don't remember the exact date, he's with TRF Pacific.

Q Was he a party to a residential real estate transaction?
A No.

Q Was TRF Pacific a party to a residential real estate transaction?
A No.

Q In what context was he a client of yours?
A He was a party to a commercial real estate closing transaction.

Q I thought that there would be no circumstances where funds were being placed into an IOLTA account in a commercial transaction, am I mistaken?
A You're mistaken.

Q Were you acting as an LPO in a commercial transaction on behalf of Bob Parks or TRF Pacific?
A Yes, I was.

Q Was he the buyer or seller in that transaction?
A He was the buyer, his entity was the buyer.

Q Did he deposit funds with you pending a closing of the transaction?
A Yes.

Q Were those funds deposited into an IOLTA account?
A No.

Q Where were they deposited?
A He sent me instructions to invest the funds.

Q Into what type of account?
A An interest bearing account.

Q Did you charge him for the cost of opening and closing or maintaining an interest bearing account?
A No.

* * *

Pages 66-68

A Do I believe that Pacific Northwest Title?

Q Receives any benefit from the fact that SeaFirst Bank gives earnings credits on the trust account.
A I believe that the company does receive benefits which benefits them, the customer of the escrow files, because the benefits offset operating costs to maintain the trust account in the past, for example, wire fees, check charges, deposit charges, those earnings were offset and those costs were costs of overhead of operating an escrow function, so I think it's a pass-through-- it's a pass-through down to the customer.

Q Does the closing statement that the customer receives reflect any of those quote pass-throughs?
A No. Indirectly it does because it reflects an escrow fee that is lower than it would be, or line items that aren't there that would be there if we weren't-- if the company wasn't getting, you know, the offsets in the maintenance of the account, but visually --

Q I'm confused I thought the escrow fees were set by market force, not by costs.
A I said that a major factor was competitive marketplace, cost of overhead certainly, if I forgot to mention that it should be in there, cost of overhead.

Q It's speculative on your part, isn't it, that if earnings credits weren't earned that the fees to the customer would increase?

MR. BRAIN: I object to the form of the question. I don't know what you mean by fees, only the escrow fees or other things. I want a clear question.

A Yes, I don't understand, I mean.

Q Have you done any economic study yourself as to what would be the effect on fees, escrow fees charged in Washington state if no banks were allowed to pay earnings credits on trust accounts?

A I have not done any formal economic studies with respect to your question.

Q Do you know of any such studies?

A I do not know of any such studies.

Q Do you know in fact that fees in Washington state for closing escrows would increase if banks were not allowed to award earnings credits on trust accounts?

A. I do not know in fact.

Q Does Pacific Northwest Title charge any line items on an escrow closing other than-- or has it other than the trust accounting fee that was charged if funds went into an IOLTA account?

A We do charge for courier and express fees.

Q Any other line items that are changed?

A Not consistently.

Q Are others sometimes charged?

A If it's applicable to the escrow file there may be additional charges.

Q Can you think of some that are sometimes charged?

A Yes, if we are asked to pay off excessive numbers of credit cards we will charge a check charge for that service.

Q Any others?

A If there is an RIC 1031 exchange we will add a charge to the exchanger's closing statement for working with the exchange facilitator. Those are what come to mind at the moment.

Exhibit 6 to Declaration of Nicholas Gellert

EXCERPTS OF DEPOSITION OF
GREGORY HAYES
October 16, 1997

Pages 8-15 of Deposition Transcript

Q As far as you know does your membership in the Washington Legal Foundation provide you any benefits?
A It provides avenues for methods of resulting-- getting a result, if you will, on constitutional issues. I find that is a huge benefit.

Q When did you first learn of the IOLTA program?
A It was after the transaction in August of 1996, as I said before, when a friend of mine and I were discussing this program that existed and I verified on my documents that I was part of that program even though it was against my will.

(Exhibit No. 1 - 2 marked)

Q Take a moment and take a look at exhibits one and two to your deposition. Have you had an opportunity to look at those?
A Yes, they appear like I submitted them.

Q What are they?
A Exhibit No. 1 is the receipt for deposit on the property that was held in escrow and the second is the financial transaction that occurred to close the property.
Q Are these all the records in your possession concerning the purchase of the property?

A Yes.

Q Do you know whether Mr. Fossum has any additional documents beyond these concerning the purchase of the property?
A It is my belief that he does not. The last document that I received, this one here, the two page document, Exhibit No. 1, I received a few months after the transaction from him so that should complete all the paperwork.

Q You indicated, I think, that you confirmed by looking at these documents compliance with IOLTA, where was it that you saw that on that document?
A Exhibit No. 1 it's on the check at the bottom, IOLTA trust account.
Q What is the second page of Exhibit No. 1?
A It is the escrow trust receipt that we put $2,000 down on the property at Fidelity National Title, deposited that $2,000 into an IOLTA trust account.

Q Is Sandra Fossum a party to the real estate transaction?
A She was like my wife quit deeded out but both my wife and Sandra were there for the closing and we quit deeded them, you'll find that in Exhibit No. 2.

Q If I understand the second page of this document correctly then Fidelity National Title Company of Washington received from the Fossums $2,000 as the earnest money deposit on the property that you and Mr. Fossum were purchasing?
A The check is in their name, yes. I gave Roger $1,000 to cover my half of the purchase.

Q Was that money delivered to Fidelity National Title Company on August 14, 1996?
A To the best of my knowledge it was.

Q Is there any real estate broker involved in the purchase of this property?
A No.

Q When did the transaction close?
A I believe it was August 30th, or the beginning of September, one of those two days. Without looking at the document I believe it was August 30th that the title transferred.

Q Were additional funds beyond the $2,000 earnest money agreement deposit also delivered to Fidelity National Title Company?
A There was approximately-- the answer to your question is yes.

Q And when was the next delivery of funds made?
A I believe on the 28th of August it was $12,793.32.

Q You're referring to the second page of Exhibit No. 2?
A Yes, balance needed to close.

Q Did Mr. Beck finance?
A Yes, he did.

Q So he lent you in essence $22,500?
A Yes, there is a deed of trust and that's been closed.

Q Has that been paid now?

A Yes.

Q When was that paid off?
A At the end of this past August, I couldn't give you the exact date without looking at my receipts.

Q How did you choose to use Fidelity National Title Company?
A I would have to say it was either my partner that made the decision or Kevin Beck and I was told where to go and how much to bring.

Q Do you know any factors in how that decision was made about which title company to use?
A I believe it was random, something close to the location.

Q Do you know whether the price of the fees to be charged was considered?
A They were not.

Q In what form was the balance needed to close delivered to Fidelity National Title Company?
A You're referring to the $12,000, and there were two checks, one from Roger Fossum and one from myself, cashier's checks.

Q And do you know where Fidelity National Title Company deposited those funds?
A From the documents it appears they deposited them in SeaFirst.

Q What are you referencing there for that information?
A The fifth page Exhibit No. 2.

Q The document that is entitled notice concerning collected funds and disbursement of funds?
A Yes.

Q Do you know whether that is an IOLTA account?
A I cannot say that. I make the assumption that it is since the receipt states that it's going into an IOLTA account on Exhibit No. 1.

Q Exhibit No. 1 references the $2,000?
A Deposit.

Q Earnest money deposit, correct?
A Right.

Q And this fifth page of Exhibit No. 2 is referencing the additional funds, isn't it?
A Yes, I would agree.

Q Have you seen anything else that would indicate whether or not this SeaFirst bank account referenced here was an IOLTA account or not?
A No, I have not seen that.

Q Did you expect to earn interest on your earnest money deposit being held by Fidelity National Title Company?
A Not directly.

Q Did you expect to indirectly receive interest on that deposit?
A I indirectly expected that in exchange for an escrow account through the bank the cost would not be forwarded to the title company. The bottom line is the

consumer is having to pay because everybody's business has to make money. You can't run a business and lose money.

Q For very long at least.
A Three years.

Q I'm not sure I completely understood what your expectation was. You expected that the title company was going to receive the interest?
A Let me clarify.

Q Okay.
A I believe, this is my belief now as how business worked previous to the IOLTA system, that in exchange for an escrow account the bank would provide that service for free, to the escrow company, therefore the consumer that deposits the money does not get charged. As a result the bank no longer can make that money, the escrow company has to back charge or pay for that account, which in turn the consumer has to reimburse the escrow account at an escalated fee. It's basic business.

Q Do you know how Fidelity National Title Company sets its fees?
A No, I do not.

Q Have you chosen an escrow closing company for the pending sale of the property?
A It will be the same because the fees will be reduced because of the title search costs.

Q So you'll be using Fidelity National Title again?
A Yes.

Q Do you know how it sets the fees it's going to charge you for the closing of the sale of the property?
A I don't know how exactly their charges are set up, if that's what you're asking, what percentages they base it on. It also depends on the type of loan the buyer brings to the table, whether it's FHA or VA or conventional. That's about the extent of my knowledge.

Q Do you know whether the fees charged by Fidelity National Title Company included any line item for the cost of complying with IOLTA?
A I do not see a breakdown of that particular line item in the documents.

Q Have you ever seen any such line item breakdown?
A No.

Q Is it Sharon Brinley who is the escrow closing officer that purchased the property?
A Yes.

Q Will she be the escrow closing officer for the sale of the property?
A I do not know that at this time.

Q Have you ever heard of the term earning credits?
A I've heard of it, yes.

Q Do you know whether SeaFirst Bank was providing Fidelity National Title Company earnings credits on any trust accounts?
A I don't know that, that's beyond the scope of my knowledge.

* * *

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Q And she was an employee of that entity?
A I hope so.

Q That was your understanding?
A It is. We haven't got the deed yet, so maybe not.

Q What specifically do you believe has been taken from you as a result of IOLTA?
A Well there are a couple of issues. One, I'm not having a choice to receive the interest from my withholdings and having those funds used for organizations that I may not agree with or agree or disagree, generally their causes. And two is the decision that the money is being taken against my will, if you will, so it's basically a first and fifth amendment issue in my opinion but I'm not an expert at law.

Q Have you taken any action to avoid having the funds for the pending sale of your property put into an IOLTA account?
A My understanding of the regulation is that the officer does not have that choice by law, it must go-- at least the transactions that I'm dealing with, small funds must go into an IOLTA account.

* * *

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Q . . . in particular are you seeking reimbursement?
A It would be the portion of the interest that would be due on any money held in the IOLTA account, from this transaction or any future transactions.

Q Why do you believe you are owed that interest?
A Because I believe that the cost of doing business with an escrow company in order to close the property that they have to increase their fees and I have to pay them an increased fee to cover that cost of the IOLTA.

Q How much more do you think you pay? How much more do you think you've paid as a result of IOLTA than you would have had to pay?
A I don't have any idea, I'm not privy to that information, I don't know what the agreements are between escrows and banks.

Q But you believe you've paid more than you should have?
A As a result of the IOLTA, yes.

Q Do you know how you're going to place a value on that for purposes of claiming reimbursement?
A At this current time I do not.

* * *

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A Whatever money that's gone into the IOLTA supports those funds directly or indirectly.

Q So if you haven't had any property taken you haven't been forced to speak in support of those causes, is that a fair characterization?
MR. SAMP: I think that's a little bit hypothetical, I think what he said was the taking of his property is what he considered his speech.

Q Is that your understanding of the response?
A Yes.

MR. GELLERT: I don't have anything more, thanks.
MS. HART: No questions.

Exhibit 7 to Declaration of Nicholas Gellert

EXCERPTS OF DEPOSITION OF
PETITIONER ALLEN D. BROWN
October 20, 1997

Pages 10-11 of Deposition Transcript

Q Does Brown-McMillen Real Estate have any contractual relationships with any escrow companies?
A No.

Q Does Brown-McMillen Real Estate have any informal relationships with any escrow companies?
A You're asking me if I have an agreement to do business with them?

Q Or some referral agreement or anything like that.
A No, I'm stockholder of two title companies which in turn have escrow services but they are not -- there are no contractual agreements.

Q Which title companies do you have stock ownership in?
A I have stock ownership in Land Title, which is Mt. Vernon Abstract and First American Title in Mt. Vernon.

Q First American Title what?
A First American Title of Mt. Vernon.

Q Do you hold any board positions in either of those title companies?

A I serve on the board of Land Title Company, I have for ten years or more and presently.

Q Have you held any officer position in either of those companies?
A I'm presently the chairman or the president of the Land Title Company.

Q How long have you held that position?
A About four years.

Q Do both of those title companies have escrow departments?
A Yes, they do.

Q Do you know whether either of those companies has any limited practice officers?
A I know Land Title does.

Q Do you know whether First American does?
A Well I'm sure they do but I couldn't guarantee that.

Q Do you believe they do from the nature of their business?
A I know they do because we've closed transactions there with their LPOs, so I guess I do know.

Q Do you know whether you're making any claim in this lawsuit that you've been damaged as a result of any impact of the IOLTA program on either of those title companies?
A Am I making that claim?

Q Right.

* * *

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Q What did you and Mr. Ronhaar specifically discuss with respect to the loss of these credits?

A I believe probably one of the conversations would have been that it's going to show up on our profit and loss for the title company itself if we went back to paying these bills. And then as myself as-- we could go into that a little deeper, I primarily bought and sold, you know, two to eight transactions a year I suppose where my funds were-- I had no control over where those were going so that was part of the conversation too.

Q As a result of your discussions with Mr. Ronhaar was there any decision about what to do with respect to this loss of earnings credits?

A I think-- I believe this at some point was presented to the board and the board directed Mr. Ronhaar to see if we couldn't renegotiate with Skagit State and Whidbey Bank to at least get a part of these earned credits that we were getting, and that's been the case, we have been . . .

* * *

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Q When you do that did you do it individually or did your real estate company take title?

A I take title to them in Allen Brown doing business as Brown-McMillen, so it's the real estate company.

Q So your real estate company is not incorporated?

A No.

Q Is it a partnership?

A A sole proprietorship, it used to be a partnership. I bought my partner out four years ago and switched it back.

Q In the Anderson transaction was there any earnest money agreement deposit, do you know?

A I don't know, when I purchased there were funds deposited but I don't know about earnest money.

(Exhibit No. 1 marked)

Q Handing you Exhibit No. 1 to your deposition can you tell me what that is?

A That's the purchase of the Anderson property.

Q That's the closing statement issued by Land Title Company?

A Yes.

Q Do you possess any other documents with respect to the closing of that transaction?

A The normal documents, deed and escrow papers, but

* * *

Pages 35-36

Q Now in an interrogatory answer in this case you responded that you estimate that $4.96 in interest was earned on your funds in this Anderson transaction, correct?

A I think that's true, that we kind of made an estimate on.

Q How did you go about making that estimate?
A It probably was based on one percent of the $90,000 that we had, the $90,521 in there.

Q For how long was that money there?
A I think in this particular transaction it was only there two days.

Q Why did you choose one percent as the interest rate by which to calculate the estimated interest?
A Well because I think that's what Skagit State is paying the IOLTA account right now and the balance is going to earnings credits.

Q Are you saying that without IOLTA in place you would have earned $4.96 on this transaction?
A Without IOLTA in place I may not have earned anything but it would have been earned in the sense of earning credits for the title company in this case.

Q And how as a user of Land Title or customer of Land Title Company did you benefit, if at all, from Skagit County Bank awarding earnings credits?
A Well as I stated earlier I think it's a benefit to the customers and probably keeping costs down in lieu of costs, in lieu of bills the bank is paying them and then that I think the benefit of that is passed on to stockholders, so I think we gained from the service provided, at the cost of service provided and I as one of the stockholders also.

Q When you resold this property in September of 1997 were the funds being held by the escrow company pending the closing put into an IOLTA account?
A I don't know that, Nick, I can't remember whether a mortgage-- a lender was involved-- a lender was involved but whether they escrowed it or not, that's what I can't remember, I'm sorry, I just deal with too many.

Q Prior to the May, 1997 Anderson transaction was your most recent transaction prior to that in November of 1995, the Cleaves-- I mean the Lees?
A The Lees, that's the one I had bought that, I think the day before the IOLTA account came into . . .

* * *

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Q Earlier you indicated that you communicated an objection to IOLTA, what's the nature of your objection?
A My objection would be that I have no control over where this interest, once it goes into the IOLTA account it may be used for services that I don't necessarily agree with, would be one of them.

Q Legal services?
A Yes, right. And knowing what I know how the money is handled in our escrow operation I think it's better if we can get earned credits for it for the title company.

Q Better for whom?
A For me as a consumer and as a stockholder.

Q Do you oppose any of the uses to which money is being used?
A In the IOLTA account?

Q Yes.
A I think I probably would if I knew for sure what it was being used for.

MR. PURCELL: Off the record.
(Brief recess taken)
MR. GELLERT: Back on the record.
* * *

Pages 43-44

Q Have you heard of others?
A I've heard of others but I have no way of verifying.

Q What others have you heard have done that?
A I don't know, I mean it's been just in conversation that I think it's been a widespread practice I think throughout the industry, but I can't-- I don't know, I can't name anybody.

Q But you understand that there are a number of financial institutions that are doing that?
A Yes, or have done it in the past.

Q In response to Interrogatory No. 11 you included the statement that, quote, the monetary value of these services to escrow depositors-- actually let me show you Interrogatory No. 11 and have you read the question and answer first.
A Okay.

Q Included in your answer there is the sentence that says, the monetary value of these services to escrow depositors can be assumed to equal the amount paid by banks to the service providers. Why do you say that?
A Well I think-- I don't want to waffle if we did that-- I think if there hadn't been some earned credits with the customers' monies that there probably would be higher escrow fees being allocated to the escrow at that time. So I think these-- I think the fees that we have been getting paid by like Skagit State has been keeping our fees down in the escrow department. And don't ask me how much but I mean I think that's what I was driving at, I think our fees would be higher.

Q That's what I'm trying to get at, you just said I don't know by how much but this statement seems to imply a dollar by dollar basis, and I'm trying to figure out why you at the time you filled out this answer you thought it was on a dollar by dollar basis?
A I don't know, Nick, I think that monetary value fluctuates with the amount of monies that we have in escrow at the time too so I'm not sure what I was thinking there.

Q Have you seen any economic studies of how escrow fees have or will change over time as a result of the loss of banks awarding earnings credits?
A No, I have not.

Q Are you aware of any such studies?
A. Studies?

Q Yes.

**DECLARATION OF KEITH LEFFLER
IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

1. I am an Associate Professor of Economics at the University of Washington. I have reviewed the memorandum in support of summary judgment filed by plaintiffs and the Wheeler declaration. I am familiar with the economics of real estate transactions and the banking industry from personal experience and from my academic studies. I specialize in the analysis of competition and in determination of competitive prices.

2. Plaintiffs incorrectly base their analysis of the alleged effects of the IOLTA program on the owners of escrow funds on a presumption that both the banking markets and the escrow services markets in Washington operate like the economic stylization of a perfectly competitive market. While, of course, banks and escrow companies compete, such competition is, in fact, far from that hypothesized by the perfectly competitive construct. The very recognition of the significant transactions cost undermining the escrow companies' ability to pass on interest to their clients is itself inconsistent with a perfectly competitive market. Escrow transactions take place in a market where most buyers operate with incomplete information and deal in such transactions sporadically at best. Many companies bundle both escrow services and title insurance services such that escrow service pricing may be used to attract related business. Determination of the equilibrium pricing structure in the escrow services market is quite complex, and certainly there is no presumption that a change in banks' earnings credits policies will be passed on to escrow services' customers.

Indeed, it is my understanding that escrow fees do not vary, for example, with the amount of the earnest money held in trust.

3. Banks also do not operate in a perfectly competitive market. As any bank customer has observed, the rates and mix of services offered by banks vary substantially among the banks and among each bank's customers. The absence of perfect competition is manifest from Mr. Wheeler's observation that some banks continue "to provide some earnings credits in addition to payment of interest to the IOLTA program." (Wheeler at paragraph 8.) Even if banks have an incentive to compete to hold escrow funds that generate significant transactions cost, there is no sound reason to believe that the form of such competition will be limited to or substantially composed of earnings credits that directly impact the cost of providing escrow services. Indeed, banks entice clients with nice lunches, tickets to their luxury boxes, convenient locations, free ATM services, friendly tellers, and myriad other features that may or may not impact the costs then incurred to service an escrow company's clients.

4. It is very likely that the IOLTA program has had no effect on the prices paid by the users of escrow services. It is also theoretically possible that there has been some impact. This is not an issue that can be resolved by theory or inference. Only a careful economic analysis of the prices and structure of the prices before and after the institution of the program could demonstrate that there has in fact been some adverse impact on the clients of LPO services from the IOLTA program. Plaintiffs have not done such an analysis. Neither plaintiffs' memorandum nor Mr. Wheeler's declaration even assert that prices have

in fact gone up since the IOLTA program, much less providing any empirical support for such a conjecture.

5. Mr. Wheeler does assert that reductions in earnings credits by banks "inevitably are passed along by escrow and title companies to their customers." (Wheeler at paragraph 9.) There is no basis in economic theory for this assertion given the actual structures of the banking and escrow services markets. The only support offered by Mr. Wheeler is the fact that "[s]ome escrow companies have taken to including those [unspecified] bank charges as a separate item on closing statements . . . denominated as an 'IOLTA fee'." (At paragraph 9.) The designation of the basis for a component of a fee is of no economic substance. When buyers operate under incomplete information as to the exact costs incurred by sellers, the sellers are always testing whether they can profitably raise prices. Of course, designation of part of a price change as cost-based can minimize the buyers' incentives to search for alternative cheaper suppliers. The lack of any economic substance to the designated IOLTA fee is obvious in that it was charged to both the buyer and the seller and the amount certainly bore no relationship to any change in earnings credits from a $200 earnest money deposit.

6. Further, even if one could show the fact that the IOLTA program reduced earnings credits received by escrow companies for LPO services, and even if one could show that as a result there was an average increase in the prices paid by users of these services, there would be no reason to believe that the impact on any particular client would bear any relationship to any loss of earnings credit on the funds of that client, much less any relationship to the interest paid to the IOLTA program on that client's funds. Since the IOLTA program exists only because of the

prohibitively high costs of determining what would be the interest earnings due a particular client, it can be presumed that determining client specific impact of any change in earnings credits would be even more prohibitively costly. Therefore, in my opinion, even if all the unsupported premises of plaintiffs' theory are assumed correct, it is complete speculation to claim that any particular LPO client has been adversely impacted by the IOLTA program or has suffered any "taking."

I certify under penalty of perjury under the laws of the United States of America and of the State of Washington that the foregoing is true and correct.

DATED: December 1, 1997

/s/
Keith Leffler

EXCERPTS FROM BRIEF OF WASHINGTON STATE BAR ASSOCIATION IN SUPPORT OF PROPOSED ADMISSION TO PRACTICE RULE 12(*h*)

Filed in the Supreme Court of Washington
February 2, 1994

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E. Question 3: The Proposed Rule Imposes Requirements On Certified Closing Officers Which Are Unaffected By The Name And Signing Authority On The Employer's Trust Account.

The proposed rule imposes obligations on certified closing officers with respect to any transaction for which the officer prepares legal documents. The officer's

responsibility is to ensure that any funds deposited by the customer in connection with the transaction are deposited into an account for the benefit of the customer or the Legal Foundation. It is irrelevant whether the officer has any responsibility over accepting and disbursing funds, or any signing authority with respect to the bank account.

Certified closing officers are in the same position as lawyers. The lawyer may or may not have his or her personal IOLTA account, but the lawyer is clearly subject to an obligation that any funds deposited with the lawyer or his or her employer must be deposited in a trust account to benefit the client or the Legal Foundation. Suppose, for example, an associate in a law firm receives a settlement check made payable to the law firm, which is a professional service corporation organized pursuant to RCW ch. 18.100. (The example works equally well for any "partner" or "shareholder" who has no signing authority over the firm's trust account.) The associate may have no signing authority over the firm's trust account, and the funds may be directed to the firm, not to the individual associate. Nonetheless, the associate must ensure that those funds are deposited into an account authorized by RPC 1.14.

The certified closing officer is in exactly the same position as the associate in the hypothetical example. If the certified closing officer "practices law" for a transaction by selecting, completing, or preparing legal documents, the officer should be required to see that the funds are deposited into an account authorized under RPC 1.14.

Escrow companies, title companies, and bank/lending institutions breach their fiduciary duties as trustees whenever they receive benefits from their trust accounts. This Court should not permit certified closing officers, who

are licensed by the Court, to facilitate this breach of fiduciary duty, whether or not the officer accepts or disburses funds. Title companies, escrow companies, and banks/lending institutions act in the capacity of a trustee when they accept funds in connection with the closing of real and personal property transactions. ***Estate of Jordan v. Hartford Co.***, 120 Wn.2d 490, 501, 844 P .2d 403 (1993). A trustee is prohibited from accepting any benefit from the funds of the beneficiary: "A trustee will not be permitted to manage the affairs of his trust, or to deal with the trust property, so as to gain any advantage, either directly or indirectly for himself." ***Tucker v. Brown,*** 20 Wn.2d 740, 748, 150 P.2d 604 (1944) (quoting ***Linsley v. Strang,*** 149 Iowa 690, 126 N.W. 941, 128 N.W. 932 (1910)). The ***Restatement (Second) of Trusts*** § 170 comment *o* (1959) makes this clear: "The trustee violates his duty to the beneficiary if he accepts for himself from a third person any bonus or commission for any act done by him in connection with the administration of the trust." The reason for this rule is simple and sound – if the trustee is permitted to receive a benefit, even indirectly, he or she will be tempted to use the services of the institution paying the benefit, even if that might not be in the best interest of the beneficiary. *Id.* The Department of Licensing has recognized this principle in its regulations, providing that escrow companies "shall hold the funds in trust for the purposes of the transaction or agreement and shall not utilize such funds for the benefit of the agent or any person not entitled to such benefit." WAC 308-128E-011.

Despite these clear principles of trust law, it is acknowledged that escrow companies and title companies derive an indirect benefit from their client funds held in trust. This Court stated in its letter calling for briefs, "Both

the escrow companies and the title companies admit they receive from their banks significant economic benefits from their trust account deposits." (App. C, p. 2) Members of the Washington State Escrow Commission alluded to these benefits during a Commission discussion of the proposed rule:

> Issues concerning the product/service benefits received by escrow companies and others provided by financial institutions were raised. Automated accounting programs, computer software, and equipment were identified as typical benefits.

Washington State Escrow Commission Meeting Minutes, p.6 (9/9/93).

Certified closing officers licensed by this Court should not be permitted to facilitate a breach of trust by their employers, who clearly are deriving a benefit from their customers' funds. However inadequate the ethics of the marketplace, this Court should not countenance its own licensees' participation in this breach:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.

> (***Wendt v. Fischer,*** 243 N.Y. 439, 444) [154 N.E. 303]. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgement of this court.

Tucker v. Brown, supra, 20 Wn.2d at 768-69 (quoting ***Meinhard v. Salmon***, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R 1 (1928). This Court should decline to allow certified closing officers licensed by the Court to participate in any employment arrangement by which the high standards imposed on a trustee are lowered to the level of the workaday world.

* * *

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The need is great; the Court has the power. The Association respectfully asks the Court to adopt the proposed rule without delay.

RESPECTFULLY SUBMITTED this 1st day of February, 1994.

Edwards, Sieh, Wiggins & Hathaway

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SUPPLEMENTAL STATEMENT OF AUTHORITY BY WASHINGTON STATE BAR ASSOCIATION IN SUPPORT OF PROPOSED ADMISSION TO PRACTICE RULE 12(*h*)

Filed in the Supreme Court of Washington
April 13, 1994

The Washington State Bar Association respectfully files this supplemental statement of authority.

The Association argued in its brief the impropriety of escrow and title companies deriving indirect benefits from their client funds held in trust, and the particular impropriety of the participation in these activities by closing officers certified by this Court. (Br. of WSBA, pp. 31-32) The Legal Foundation of Washington similarly argued that such practices constitute self-dealing and appear to violate regulations governing escrow companies. (Legal Foundation of Washington Br., p. 34)

On March 9, 1994, the Federal Reserve Bank of San Francisco issued an interpretation of Regulation Q (12 CFR Part 217), pointing out that such arrangements may violate banking law as well as state fiduciary law. A copy of the interpretation is attached to this supplemental statement of authority for the convenience of the Court.

RESPECTFULLY SUBMITTED this 13th day of April, 1994.

EDWARDS, SIEH, WIGGINS & HATHAWAY

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SUPREME COURT OF WASHINGTON'S IOLTA ADOPTION ORDER

June 19, 1984

[The amendments to the Code of Professional Responsibility which created an Interest on Lawyers' Trust Accounts (IOLTA) program were adopted June 19, 1984, published in the Washington Reports advance sheets July 6, 1984, and are effective January 1, 1985. In order to assist members of the Bar in the understanding and implementation of the rule changes, the complete text of the adoptive order is set forth below.]

WILLIAMS, C.J. – In December 1981, a Washington attorney petitioned this court to establish an Interest on Lawyers' Trust Accounts (IOLTA) program, to be implemented by amendments to CPR DR 9–102 of the Code of Professional Responsibility. After almost 2 years of studying the concept and various alternative means of implementing it, a proposed rule was drafted by a joint committee of the Washington State Bar Association and the Seattle-King County Bar Association. The joint draft was submitted to this court, which published it for public comment pursuant to General Rule 9. See 100 Wn.2d, Advance Sheet 8, at i (1983). The court received 531 public comments, 424 of which (80 percent) supported the proposed IOLTA program. Following the expiration of the public comment period, the court published an order calling for briefs and oral arguments on the proposed rule change, and designating the Seattle-King County Bar Association to represent the proponents of the proposed rule (hereinafter proponents) and the Walla Walla County Bar Association to represent the opponents (hereinafter opponents). See 100

Wn.2d, Advance Sheet 13, at i (1984). Oral argument was heard on May 14, 1984.

We hereby adopt the proposed amendments to CPR DR 9-102 as set forth in the order following this opinion. In so doing, we make clear that those funds available for the IOLTA program are only those funds that cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client.

I.

Nearly half the states have some form of IOLTA program, *see* National IOLTA Clearinghouse, *IOLTA Update*, vol. 1, No. 3 (Winter 1984), at 11-13, as do all the Canadian provinces. The highest courts of four states have rejected IOLTA proposals. *IOLTA Update*, at 7. The Washington proposal is largely patterned after the Minnesota IOLTA program, which is a "mandatory" program in which attorneys are required to participate.

Presently, the obligations of Washington lawyers with respect to client trust funds are determined primarily by CPR DR 9-102 of the Code of Professional Responsibility and by the common law of trusts. In general, attorneys must hold client trust funds in accounts separate from their own funds, and are obligated to maintain complete records and pay the funds over to the clients or others as soon as they are entitled to receive them. *See* CPR DR 9-102. CPR DR 9-102 does not address the question of whether attorneys must invest such funds for the benefit of clients. In conformity with trust law, however, lawyers usually invest client trust funds in separate interest-bearing accounts and pay the interest to the clients whenever the

trust funds are large enough in amount or to be held for a long enough period of time to make such investments economically feasible, that is, when the amount of interest earned exceeds the bank charges and costs of setting up the account. However, when trust funds are so nominal in amount or to be held for so short a period that the amount of interest that could be earned would not justify the cost of creating separate accounts, most attorneys simply deposit the funds in a single noninterest-bearing trust checking account containing all such trust funds from all their clients. The funds in such accounts earn no interest for either the client or the attorney. The banks, in contrast, have received the interest-free use of client money.

The IOLTA program adopted by this court contains the following general requirements:

1. *All* client funds paid to any Washington lawyer or law firm must be deposited in identifiable interest-bearing trust accounts separate from any accounts containing non-trust money of the lawyer or law firm. The program is mandatory for all Washington lawyers. New CPR DR 9-102(A).

2. The new rule provides for two kinds of interest-bearing trust accounts. The first type of account bears interest to be paid, net of any transaction costs, to the client. This type of account may be in the form of either separate accounts for each client or a single pooled account with subaccounting to determine how much interest is earned for each client. The second type of account is a pooled interest-bearing account with the interest to be paid directly by the financial institution to the Legal Foundation of Washington (hereinafter the Foundation), a nonprofit entity to be established pursuant to the order following this opinion. New CPR DR 9-102 (C)(1), (2).

3. Determining whether client funds should be deposited in accounts bearing interest for the benefit of the client or the Foundation is left to the discretion of each lawyer, but the new rule specifies that the lawyer shall base his decision solely on whether the funds could be invested to provide a positive net return to the client. This determination is made by considering several enumerated factors: the amount of interest the funds would earn during the period they are expected to be deposited, the cost of establishing and administering the account, and the capability of financial institutions to calculate and pay interest to individual clients. New CPR DR 9-102(C)(3).

4. A lawyer may, but is not required to, notify his or her clients of the intended use of interest paid to the Foundation. New CPR DR 9-102(C)(1).

5. Lawyers and law firms must direct the depository institution to pay interest or dividends, net of any service charges or fees, to the Foundation, and to send certain regular reports to the Foundation and the lawyer or law firm depositing the funds. New CPR DR 9-102(C)(4).

The Foundation must use all funds received from lawyers' trust accounts for tax-exempt law-related charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, as directed by this court. See Articles of Incorporation and Bylaws of the Legal Foundation of Washington, 100 Wn.2d, Advance Sheet 13, at ii, vi (1984).

The new rule also incorporates the "technical changes" proposed by the Seattle-King County Bar Association. These changes do not affect the substance of the program as published for public comment, but merely make small improvements in ambiguous or redundant wording, help reduce transaction costs, aid in creating

more effective oversight and administration by this court, and bring the program into closer conformity with the current accounting practices of Washington financial institutions.

Opponents argue that the new IOLTA program is unconstitutional, unethical, and would require attorneys to violate their fiduciary duties to their clients. Opponents also argue that the new program would lock us into the current state of banking technology, and that any IOLTA program created should require attorneys to obtain the consent of each individual client before paying over interest on his or her trust funds to the Foundation. Each of these arguments will be addressed in turn.

II

It is contended by the opponents that the new IOLTA program constitutes an unconstitutional taking of property without due process or just compensation in violation of the United States and Washington Constitutions. The primary issue here is whether the interest from nominal or short-term client trust funds constitutes "property" within the meaning of the state or federal constitutions.

Proponents make three arguments in response. They first claim that clients have no "property" right to the interest generated by short-term or nominal trust funds held by their attorneys because such funds are inherently unproductive. Second, they urge the interest on them is either de minimis or illusory since it could not be realistically paid to individual clients once transaction costs and lawyer's fees are taken into account. Third, they claim that the IOLTA proposal would *create* property where none existed before, and giving the client control over whether

his or her money will be permitted to earn interest to be paid to the Foundation would merely constitute a right to compel economic waste, which is not a property right and has no market value for purposes of just compensation. Opponents contend just as strongly that money is property, and that once interest exists it is the property of the person who owns the principal, no matter how small the amount earned might be.

The weight of authority supports the view that interest on nominal or short-term trust deposits is not property. Opponents' argument that the interest is property rests almost entirely on one case, *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 66 L.Ed.2d 358, 101 S. Ct. 446 (1980).[2] In *Webb's*, the purchaser of a corporation's assets tendered over $1.8 million into court in an interpleader action. The payment into court was required by Florida law, which also provided that a percentage fee totaling over $9,000 be charged for the clerk of the court's services in receiving the fund into the registry. In addition, another state statute declared that all interest from money deposited was deemed income of the office of the clerk of the circuit court. *Webb's*, at 156 n.1. After the money had been held by the court for almost a year, and had earned over $90,000 in interest, the court appointed a receiver for one of the parties and paid over the

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[2] Opponents also cite RCW 9A.04.110(21), which defines property for purposes of the criminal code as "anything of value, whether tangible or intangible, real or personal," and RCW 26.16.010, .020, which declare that the rents, issues and profits of one spouse's separate property shall not be subject to the other spouse's debts or control, as support for the proposition that IOLTA interest is property. These statutes provide weak and indirect support for opponents' argument at best.

principal of the fund to him. *Webb's*, at 157-58. The receiver sued to recover the interest earned while the court had possession of the money.

The Supreme Court defined the sole issue in the case as

> whether it is constitutional for a county to take as its own, under the authority of a state statute, the interest accruing on an interpleader fund deposited in the registry of the county court, when a fee, prescribed by another statute, is also charged for the clerk's services in receiving the fund into the registry.

Webb's, at 155-156.

The United States Supreme Court did not accept the Florida Supreme Court's decision that the interest statute was "constitutional" because interpleaded funds were "considered 'public money,'" the statute "takes only what it creates", and the interest created was not "private property." *Webb's*, at 158-59. Instead, the Court engaged in its own analysis, beginning with the proposition that "Florida's statutes would allow [the county] to exact two tolls while the interpleader fund was held by the clerk of the court." *Webb's*, at 159. The Court then noted that the principal sum deposited in the court registry was private property, that property interests are created by state law, and that "a mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Webb's*, at 161. The Court held that the creditors had much more than an unilateral expectation of receiving the principal of the fund, *Webb's*, at 161, and that the "usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are

ultimately to be the owners of that principal." *Webb's*, at 162. The Court also stated that

> [t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.

Webb's, at 155-56. The Court then stated its holding as follows:

> We hold that under the narrow circumstances of this case – where there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others – [the county's] taking unto itself . . . the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments. We express no view as to the constitutionality of a statute that prescribes a county's retention of interest earned, where the interest would be the only return to the county for services it renders.

Webb's, at 164-65.

Although some of the language in *Webb's* supports the broad general proposition that interest is property, when taken in context and in light of the very narrow and expressly limited holding, *Webb's*, we believe, is distinguishable and was not intended to decide the issue now before this court. *Webb's* dealt with an enormous amount of money held over a long period of time that generated tens of thousands of dollars in interest. Even the proponents of IOLTA concede that interest in an amount that could be feasibly and economically distributed to the owner of the principal that generated it is "property." In addition, the controlling factor for the Supreme Court was the fact that two separate levies were imposed by the Florida circuit court. *See Webb's*, at 155-56, 159-60, 162, 164-65. *Webb's* is therefore not applicable to the IOLTA context, which deals only with property rights in small amounts of interest on nominal and short-term trust deposits.

A number of state supreme courts that have expressly considered this question in the IOLTA context have explicitly or implicitly distinguished *Webb's* and held that clients do not have property rights in the interest on nominal, short-term client trust account deposits.

The Florida Supreme Court, for example, dismissed the property right contention in a single paragraph:

> With respect to constitutional concerns regarding the [IOLTA] program, we see none that bars implementation. There are many distinguishing features between the program today implemented for the generation of interest on lawyers' trust accounts, and the legal requirements of state law which led the United States Supreme Court to invoke the fifth amendment "taking" clause for the protection of private property in its *Webb's* decision. The most relevant distinction, plainly, is the fact that no client is compelled to part with "property" by reason of a state directive, since the program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances. . . It follows that no client has a "property interest," in the constitutional sense, which is being taken from him by this program.[3]

In re Interest on Trust Accounts, 402 So. 2d 389, 395-96 (Fla. 1981). *See also In re New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258, 1261 (1982), where the New Hampshire Supreme Court agreed with the Florida court's analysis distinguishing *Webb's* and holding that IOLTA interest was not client "property". The Minnesota Supreme Court dealt with this contention even more briefly:

> We do not find that under the circumstances here the client has any "property" that is being taken without compensation or without due process of law under

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[3] The Florida court's holding may be best explained as implicitly based on the ruled that an interest must be "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for the Fifth Amendment purposes." *Penn Cent. Transp. Co v. New York*, 438 U.S. 104, 125, 57 L.Ed.2d 631, 98 S. Ct. 2646 (1978). Since the client had no reasonable "investment-backed expectation" of benefiting from any interest on his trust funds, *see Penn Central*, at 124, he had no property rights in such interest. This is especially true of corporate clients, which are prohibited from benefiting from NOW accounts under federal banking law. See 12 U.S.C. § 1832(a)(2).

> either the Fifth Amendment of the U.S. Constitution or under Article 1, §§ 13, 7 of the Minnesota Constitution. *See Matter of Interest on Trust Accounts,* 402 So.2d 389 at 395 (Fla. 1981). There simply is no "property" now in existence that would be taken [by the IOLTA program].[4]

In re Minnesota Star Bar Ass'n, 332 N.W.2d. 151, 158 (Minn. 1982). *See also* Minnesota Developments, *Minnesota's New Interest on Lawyer Trust Accounts Program,* 67 Minn. L. Rev. 835, 847-48 (1983); Special Project, *Interest on Lawyer's Trust Accounts: A Proposal for Wisconsin,* 66 Marq. L. Rev. 835, 847-48 (1983). *But cf.* Baker & Wood, *"Taking" a Constitutional Look at the State Bar of Texas Proposal To Collect Interest on Attorney-Client Trust Accounts,* 14 Tex. Tech. L. Rev. 327, 355-61 (1983).

We hold that the interest on short-term or nominal client trust funds of the type that must be invested for the benefit of the Foundation pursuant to the new CPR DR 9-102 does not constitute "property" as defined by the United States or Washington Constitutions. This holding makes it unnecessary to consider whether the IOLTA program requires or permits unconstitutional takings without due process or just compensation.

III

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[4] Neither party cites any Washington case to show that the definition of "property" is different under the Washington Constitution than under the United States Constitution. Proponents imply that the meaning of "property" is the same under both the state and federal constitutions.

Opponents also argue that it is "unethical" for lawyers to use interest from nominal or short-term funds for anything other than the client's benefit. Since this court has amended the Code of Professional Responsibility to *require* lawyer participation in IOLTA, such participation is by definition ethical. We are, nevertheless, concerned with a claim that the program would violate the spirit of the code, and create an appearance of impropriety to laymen.

Since neither this court nor the Washington State Bar Association has previously considered this question, the only real authority is ABA Formal Opinion 348, issued by the ABA Standing Committee on Ethics and Professional Responsibility on July 23, 1982, *reprinted in* 68 A.B.A. J. 1502 (1982).

The ABA Opinion began by holding that "nothing in the model code [of professional responsibility] prohibits a lawyer from placing clients' funds in interest-bearing accounts so long as the other requirements of D.R. 9-102 [virtually identical to Washington's present CPR DR 9-102] are met." 68 A.B.A. J. at 1502.

The committee next held that "the model code does not specify that a lawyer has the duty to invest clients' nominal or short-term funds entrusted to the lawyer." 68 A.B.A. J. at 1503. However, the committee noted that the model code does provide a basis for professional discipline for extreme violations of lawyers' fiduciary duties as trustees, which require that

> where the amount of funds held for a specific client and the expected holding period make it obvious that the interest which would be earned would exceed the lawyer's administrative costs and the bank charges,

> the lawyer should consult the client and follow the client's instructions as to investing.

68 A.B.A. J. at 1503 (citing CPR DR 6-101(A)(1), CPR DR 6-101(A)(3), and CPR DR 7-101(A)(1)).

Regarding the lawyer's duty once an interest-bearing account is established, the committee made it clear that the full range of duties imposed by the model code applied, but that interest earned on nominal or short-term trust money is to be treated as funds of the tax-exempt organization to which it is paid rather than as funds of the client. 68 A.B.A. J. at 1503. Therefore, in the IOLTA context the duties established by the code are duties that the attorney owes to the Foundation, not the client.

On the ultimate question of whether lawyers may ethically participate in IOLTA programs, the committee considered a program distinguishable from the new Washington program only in that it was optional for attorneys. After reviewing the Florida IOLTA case and relevant IRS rulings, which held that IOLTA interest is not property and does not constitute taxable income to the client, respectively, the committee concluded:

> The model code does not establish whether it is ethically permissible for lawyers to participate in these programs. In the opinion of the committee, however, the rationale for the ethical acceptability of these programs is the same as the premise for acceptability in constitutional law and tax law. The client has no right under the circumstances to require the payment of any interest on the funds to himself or herself because the amount of interest which the funds could earn is likely to be less than the appropriate

> charges for administering the earnings. The practical effect of implementing these programs is to shift a part of the economic benefit from depository institutions to tax-exempt organizations. There is no economic injury to the client. The program creates income where there was none before. For these reasons, the interest is not client funds in the ethical sense any more than the interest is client property in the constitutional sense of client income in the tax law sense. *Therefore, assuming that either a court or a legislature has authorized a program with the attributes described above and thus, either implicitly or explicitly, has made a determination that the interest earned is not the clients' property, participation in the program by lawyers is ethical.*

(Italics ours.) 68 A.B.A. J. at 1504-06. The committee further held that

> The model code also imposes no duty to obtain prior consent or to notify clients of the application of their funds in the programs described above . . . Furthermore, it is ethically proper without the client's consent to allow the application of a portion of the earnings on these funds to reasonable bank charges.

68 A.B.A J. at 1506. *See also In re Minnesota State Bar Ass'n,* 332 N.W.2d 151, 158 (Minn. 1982) (citing the ABA Opinion as support for the "ethical basis" of the Minnesota IOLTA program). We find the reasoning of the ABA Opinion persuasive.

Another concern expressed by opponents is that the IOLTA program will create an appearance of impropriety. They cite no authority or facts to support this assertion. The

only evidence in the briefs on this point is that the two largest newspapers in Washington have published editorials lauding IOLTA. See Seattle Post-Intelligencer, Apr. 16, 1984, at A6; Seattle Times, Dec. 26, 1983. Given the press' role in molding public opinion, these editorials provide at least some evidence that IOLTA would be seen by the public rather than improper.

We believe that the new IOLTA program is consistent with both the spirit and letter of the Code of Professional Responsibility.

IV

Opponents contend that the new IOLTA program would require attorneys to violate their fiduciary duties as trustees in two different ways.

First, they allege that investing client trust money for the benefit of the Foundation, allegedly to satisfy attorneys' ethical obligations to provide legal help to poor Washingtonians, or to provide more work for Washington lawyers, would be self-dealing or the selling of investments to an "affiliated company or association," in violation of RCW 30.24.090.[5] Neither side cites any authority on whether the Foundation is an "affiliated... association" within the meaning of that statute. However, the wording and context of the statute strongly suggest that the statute was only meant to prohibit a trustee or, in the case of a trustee who is an officer or director of a corporation, bank or trust

[5] RCW 30.24.090 provides: "Unless the instrument creating the trust expressly provides to the contrary, any fiduciary in carrying out the obligations of the trust may not buy or sell investments from or to himself or itself or any affiliated or subsidiary company of association."

company, from misusing trust funds for his or her own pecuniary advantage or the advantage of his or her corporation, bank or trust company. Furthermore, the Foundation will be "affiliated" with all Washington lawyers in only the most tenuous nonlegal sense, and it would appear that any additional lawyer "business" that might be created by Foundation expenditures would inure mostly to the benefit of lawyers other than (and not "affiliated" with) those that hold substantial client trust funds. The proposed rule does not permit consideration of general ethical duties to help poor people or the financial plight of lawyers who serve such clients in making investment decisions. *See* new CPR DR 9-102(C)(3).

The opponents' second fiduciary argument alleges that the factors listed in proposed CPR DR 9-102(C)(3), as published for public comment by the court, require attorneys to consider factors other than their clients' best interest in determining whether to invest trust funds for their clients or for the Foundation. If true, the IOLTA program could well conflict with trust law. An attorney who holds money in trust for a client is subject to the same duties as all other trustees to make the money held productive, and only the interests of the *client* (as opposed to the interests of the trustee or a third party) can be considered. *See* 2 A. Scott, *Trusts* § 181 (3d ed. 1967 & Supp. 1983); RCW 30.24.010; *Tucker v. Brown*, 20 Wn.2d 740, 768-69, 150 P.2d 604 (1944). In addressing this issue, the ABA Standing Committee on Ethics and Professional Responsibility stated:

> where the amount of funds held for a specific client and the expected holding period make it obvious that the interest which would be earned would exceed the lawyer's administrative costs and the bank charges, the

> lawyer should consult the client and follow the client's instructions as to investing.

68 A.B.A. J. at 1503. Proponents answer the opponents' argument by interpreting the proposed CPR DR 9-102-(C)(3) in a manner consistent with trust law:

> Although the proposed amendments list several factors an attorney should consider in deciding how to invest his clients' trust funds, . . . all of these factors are really facets of a single question: Can the client's money be invested so that it will produce a net benefit for the client? If so, the attorney must invest it to earn net interest for the client. Only if the money cannot earn net interest for the client is the money to go into an IOLTA account.

Reply Brief of Proponents, at 14. This is a correct statement of an attorney's duty under trust law, as well as a proper interpretation of the proposed rule as published for public comment. However, in order to make it even clearer that IOLTA funds are only those funds that *cannot, under any circumstances,* earn *net* interest (after deducting transaction and administrative costs and bank fees) for the client, we have amended the proposed rule accordingly. *See* new CPR DR 9-102(C)(3). The new rule makes it absolutely clear that the enumerated factors are merely facets of the ultimate question of whether client funds could be invested profitably for the benefit of clients. If they can, then investment for the client is mandatory.

With these changes, we believe that new CPR DR 9-102 is consistent with lawyers' fiduciary obligations as trustees.

V

Opponents argue that the new IOLTA program ignores subaccounting techniques available at some Washington financial institutions that make payment to clients of interest on some short-term or nominal trust funds practicable and cost effective. They also assert that even if such techniques were not available or cost effective now, they probably would be so in the future. Opponents therefore fear that the validity of the IOLTA program is tied to the current level of technology, presumably on the theory that failing to take advantage of new subaccounting techniques as they become available would turn IOLTA participation into an unconstitutional taking of property that could have been distributed to the client.

This argument is without merit, since "[t]he capability of financial institutions to calculate and pay interest to individual clients" is a factor that the new rule expressly directs attorneys to consider in deciding whether to place client trust funds in an IOLTA account of in an account to earn interest for the client. New CPR DR 9-102(C)(3)(c). Thus, as cost effective subaccounting services become available making it possible to earn net interest for clients on increasingly smaller amounts held for increasingly shorter periods of time, more trust money will have to be invested for the clients' benefit under the new rule. The rule is therefore self-adjusting and is adequately designed to accommodate changes in banking technology without running afoul of the state or federal constitutions.

VI

Finally, opponents argue that the IOLTA program should utilize only the interest from trust funds of clients

who expressly consent to their lawyers' participation in the program. We decline to follow this approach. Under the program as adopted, the Internal Revenue Service will consider interest earned on short-term or nominal client trust funds to be income to the tax-exempt Foundation, not to the client. *See* Rev. Rul. 81-209, 1981-2 C.B. 16. If clients could veto the use of their trust money to earn interest for the Foundation, the IRS would almost certainly classify all IOLTA interest as "assigned income" taxable to the clients, even when the Foundation was the actual recipient of the interest. *In re Interest on Trust Accounts*, 402 So. 2d 389, 390-91 (Fla 1981); *see* Rev. Rul. 81-209, *supra*. Such a result would make the IOLTA program impracticable.

VII

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That the Washington State Bar Association shall incorporate and establish the Legal Foundation of Washington under the Articles of Incorporation and Bylaws published by this court at 100 Wn.2d, Advance Sheet 13, at i (1984), and that such action shall be accomplished no later than January 1, 1985;

2. That effective January 1, 1985, the new CPR DR 9-102 of the Code of Professional Responsibility is adopted as follows:

[Published at 101 Wn.2d 1242]

Dated at Olympia, Washington, this 19th day of June, 1984.

FILED

AUG 22 2002

OFFICE OF THE CLERK

No. 01-1325

IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

58 pp

QUESTIONS PRESENTED

In *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), the Court held that the interest on clients' funds held in so-called IOLTA accounts ("Interest on Lawyers' Trust Accounts") was the property of the clients. This case presents two questions:

1. Whether the regulatory scheme for funding state legal services by systematically seizing this property violates the Takings Clause of the Fifth Amendment to the Constitution so that the property owners are entitled to relief.

2. Whether injunctive relief is available to enjoin a State from committing such a violation of the Takings Clause, where the legislative scheme in issue clearly contemplates that no compensation would be paid to the owners of the interest taken, and where the small amount due in any individual case often renders recovery through litigation impractical.

PARTIES TO THE PROCEEDING

Aside from the parties named in the caption, the following were Defendants/Appellees in the court of appeals: Kevin Kelly, Bradley C. Diggs, Dwight S. Williams, the Honorable Gregory J. Tripp, and the Honorable Cynthia Imbrogno, in their official capacities as Presidents of the Legal Foundation of Washington; and Barbara Durham, James M. Dolliver, Richard P. Guy, and Philip A. Talmadge, in their official capacities as Justices of the Supreme Court of Washington. Those nine individuals no longer serve in the capacities listed and thus are no longer parties to this proceeding.

Petitioner Washington Legal Foundation is a nonstock corporation; it has no parent corporation, and no publicly held company owns any of its stock.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. 1a-51a) is reported at 271 F.3d 835. The opinion of the court of appeals panel that initially heard this case (Pet. App. 52a-85a) is reported at 236 F.3d 1097. The opinion of the district court granting Respondents' motions for summary judgment and denying Petitioners' motion for summary judgment (Pet. App. 86a-96a) is not reported. The order granting *en banc* review (App. 97a) is reported at 248 F.3d 1201.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2001. On February 8, 2002, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 7, 2002. The petition for a writ of certiorari was filed on March 7, 2002, and was granted on June 10, 2002. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The relevant provisions of the Fifth Amendment to the Constitution and of the Washington State Admissions to Practice Rules and Rules of Professional Conduct are set forth in the Appendix to the Petition. Pet. App. 98a-108a.

STATEMENT OF THE CASE

This case challenges the constitutionality of the Washington State IOLTA ("Interest on Lawyers Trust Accounts") program. Under that program, funds belonging to certain individuals hiring lawyers and real estate professionals in Washington are used -- without the consent and usually without the knowledge of those individuals -- to finance a variety of legal services programs. The U.S. Court of Appeals for the Ninth Circuit, in a 7-4 *en banc* decision, held that the IOLTA program does not violate the rights of Petitioners Allen D. Brown and Greg Hayes under the Takings Clause of the Fifth Amendment. The appeals court further held that the other Petitioners lacked standing to challenge the IOLTA program because they sought only injunctive relief and, the court held, injunctive relief is not a permissible remedy for a Takings Clause violation of the sort alleged in this case.

The IOLTA Program. By an order dated June 19, 1984, the Supreme Court of Washington created the Washington IOLTA program. 101 Wn.2d 1242 (1984), Joint Appendix ("JA") 148. Pursuant to that order, the court incorporated and established Respondent Legal Foundation of Washington ("LFofW") as a nonprofit corporation, with Articles of Incorporation and Bylaws promulgated by the Court. The order also amended Disciplinary Rule ("DR") 9-102 of the Washington Code of Professional Responsibility ("CPR"), which imposed obligations on Washington attorneys regarding "Preserving Identity of Funds and Property of a Client." The amendment provided that an attorney receiving client funds that were "nominal in amount" or were "expected

to be held for a short period of time" must create an unsegregated interest-bearing account (an "IOLTA account") and direct the depository institution to pay interest earned on the account to the LFofW. CPR DR 9-102(C)(1) and (4). The amendment further provided that all client funds were to be placed into the IOLTA account unless they were deposited in another interest-bearing account that resulted in the creation of "a positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). DR 9-102(C)(3). The court subsequently replaced the Code of Professional Responsibility with the Rules of Professional Conduct ("RPC"); the provisions of CPR DR 9-102 were incorporated into RPC 1.14.[1]

Both before and after 1983, many real estate transactions in Washington have been consummated by escrow companies and title insurance companies, without the assistance of attorneys. In those cases, legal documents used to complete the transactions have been selected by trained laypersons familiar with the legal requirements of such transactions. In the early 1980s, the Supreme Court of Washington ruled that such laypersons were engaged in the unauthorized practice of law. *Bennion, Van Camp, Hagan & Ruhl v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 635 P.2d 730 (1981). That decision was controversial among some members of the state legislature, who argued that the court had exceeded its constitutional bounds by attempting to regulate a field theretofore regulated by the legislature. The court attempted to settle the controversy in 1983 by adopting

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[1] A copy of the most recent version of RPC 1.14 is set forth at Pet. App. 99a-102a.

Admission to Practice Rule ("APR") 12. APR 12 established a procedure whereby nonlawyers could be licensed to select appropriate legal documents for use in real estate settlements. APR 12 established a Limited Practice Board with the responsibility for licensing such LPOs (Limited Practice Officers, also known as Certified Closing Officers).

On September 21, 1995, the Supreme Court of Washington adopted a new APR 12(h) and 12.1 in order to make LPOs subject to the IOLTA program. APR 12(h) and 12.1 make clear that LPOs' obligations to maintain and use IOLTA accounts are identical to attorneys' IOLTA obligations.[2] APR 12(h) provides that LPOs must comply with APR 12.1. APR 12.1 in turn provides that all funds received in connection with a transaction being closed by an LPO must be placed in an interest-bearing account. The interest-bearing account must be an IOLTA account (with interest payable to the LFofW), except that the funds may be placed in a non-IOLTA interest-bearing account if and only if doing so results in the creation of "a positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). APR 12.1(c)(2) and (3).

Since IOLTA's inception in 1985, interest generated by Washington IOLTA accounts has generally amounted to between $2.5 and $4.0 million per year. Pet. App. 7a. LFofW is authorized under its Articles of Incorporation to award grants to § 501(c)(3) corporations, the only limitation

[2] Copies of APR 12(h) and 12.1 are set forth at Pet. App. 103a-108a.

on grants being that they must be for the purpose of providing legal services and education to the public in civil law matters.

The Escrow Industry. The escrow and title insurance industries provide escrow services in Washington to buyers and sellers in connection with real estate transactions. Those services include holding customer funds in escrow accounts for a short period of time while the transactions are being completed.

Historically, escrow companies and title companies have placed customer trust funds into non-interest-bearing checking accounts. The accounts were non-interest-bearing because federal law (since the Depression) has prohibited federally-insured banks and savings and loans from paying interest on *checking* accounts. *See* 12 U.S.C. §§ 371a, 1464(b)(1)(B), 1828(g). *See also* Declaration of Gerald R. Wheeler ¶ 5, Pet. App. 110a.[3] Federal restrictions on interest payments by financial institutions have been relaxed somewhat since 1980, so that banks are now authorized to offer Negotiable Order of Withdrawal (NOW) accounts, which operate like traditional checking accounts yet are not considered "demand" accounts and thus are permitted to pay interest. 12 U.S.C. § 1832. For a variety of reasons, however, including federal restrictions on the use of NOW accounts by for-profit corporations and the inconvenience of subaccounting for interest earned by multiple depositors, escrow and title companies have generally declined to deposit escrow funds in

[3] The Wheeler Declaration, set forth at Pet. App. 109a-112a, was attached to the motion for summary judgment filed by Petitioners in the district court.

interest-bearing accounts. 12 U.S.C. § 1832(a)(2); Pet. App. 110a.

Although banks have not paid interest on escrow accounts, in lieu thereof they have provided what are referred to in the industry as "earnings credits." *Id.* 111a. These credits can generally be applied against fees that would otherwise be payable to the bank for a wide variety of services rendered by the bank. *Id.* Such credits directly reduce costs to customers for services, including escrow trust accounting services and wire transfers. *Id.*

The adoption of APR 12(h) and 12.1 has significantly altered that historical practice. APR 12.1 provides that all funds received in connection with a transaction being closed by an LPO must be placed in an interest-bearing account; as a practical matter, that requires placing the funds into an IOLTA account with interest payable to LFofW. Following the adoption of APR 12(h) and 12.1, many Washington banks have been unwilling to offer earnings credits on escrow accounts. In the absence of such credits, bank customers are now paying for many services that formerly were "free" (in the sense that earnings credits generally were more than sufficient to offset charges for such services). Pet. App. 111a. Some or all of those costs inevitably are passed along by escrow and title companies to their customers. *Id.* 112a. Some escrow companies have taken to including those bank charges as a separate item on closing statements. *Id.* Others simply include the bank charges as part of general overhead costs; since overhead costs are a major factor in determining a company's pricing structure, the bank charges ultimately are borne in whole or in part by escrow customers. *Id.*

The Petitioners. Petitioners Allen D. Brown and Greg Hayes regularly purchase and sell real estate as part of their business dealings. In connection with recent real estate transactions, they have placed their funds in the custody of their escrow companies, and those companies (without the consent of Petitioners) deposited the funds into IOLTA accounts. Pet. App. 14a. At the direction of the companies, interest earned on those funds was forwarded by the depository banks to Respondent LFofW. JA 49, 51. Both Brown and Hayes expect to continue to purchase and sell real estate located in the State of Washington. JA 53, 54.

Petitioner Dennis H. Daugs owns and operates a small escrow company in Federal Way, Washington. He regularly holds client funds entrusted to him in connection with real estate transactions. Pet. App. 15a. As a licensed LPO, he is subject to APR 12.1. Mr. Daugs has determined, however, that compliance with APR 12.1 and payment to LFofW of interest income belonging to his clients would violate his fiduciary obligations to his clients to protect their property. Accordingly, he has refused to participate in the IOLTA program, thereby exposing himself to potential disciplinary action. JA 57.

Petitioner L. Dian Maxwell is employed by Pacific Northwest Title Company of Washington ("PNW Title"), which provides escrow services in connection with real estate closings. Up until 1996, Ms. Maxwell was a licensed LPO. After Rule 12.1 was adopted, PNW Title determined that it could avoid being subject to the IOLTA program (and thus could save the estimated $50 per transaction cost of participating in the IOLTA program) by requiring all of its employees involved in real estate closings to surrender their

LPO licenses. JA 59; Pet. App. 16a.[4] In order to keep her job, Ms. Maxwell surrendered her license. *Id.*

Petitioner Washington Legal Foundation ("WLF") is a public interest law firm whose members include several of the other Petitioners, as well as Washington citizens similarly situated to the other Petitioners.

Proceedings Below. Petitioners filed this action in January 1997 in U.S. District Court for the Western District of Washington, alleging that the IOLTA program violated their rights under the First and Fifth Amendments. Named as defendants were LFofW, its President, and the nine justices of the Supreme Court of Washington -- sued in their official capacities only.

In January 1998, the district court issued an Order and Judgment granting Respondents' motions for summary judgment and denying Petitioners' motion for summary judgment. Pet. App. 86a-96a. The district court stated that the existence of a property right in IOLTA interest was "a prerequisite to establishing either a First or Fifth Amendment claim." *Id.* 92a. The court held that Petitioners lacked any property rights in the IOLTA interest and, accordingly, dismissed their constitutional claims. *Id.* 94a. The court also rejected Petitioners' alternative claim that the IOLTA program violated their Fifth Amendment rights by failing to compensate them for the use of their funds. *Id.* 96a.

[4] Because PNW Title no longer employs LPOs, its customers now must employ outside counsel to prepare the form legal documents used in connection with real estate transactions. JA 59.

In January 2001, a Ninth Circuit panel reversed.[5] Pet. App. 52a-85a. The panel determined that the interest income in IOLTA accounts belongs to those whose funds generated the income, and that "a government appropriation of that interest for a public purpose is a taking entitling them to just compensation under the Fifth Amendment." App. 85a. The panel remanded the case to the district court for determination of an appropriate remedy. *Id.* Rejecting Respondents' argument that the IOLTA program could be upheld under the *ad hoc* approach to Takings Clause claims articulated in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), the panel stated, "When the government permanently appropriates all of the interest on IOLTA trust funds, that is a *per se* taking, as when it permanently appropriates by physical invasion of real property." Pet. App. 77a (citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992)). The panel rejected Respondents' argument that the Takings Clause provides greater protection against government interference with real property rights than against government expropriation of intangible personal property. The panel stated, "This [argument] would imply the nonsensical proposition that a taking would *less* readily be found if a state entirely confiscated people's money from their bank accounts or IRA's than if it installed a sign on their land." Pet. App. 74a.

[5] While the appeal was pending, this Court issued its decision in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). *Phillips* held, in a case involving the Texas IOLTA program, that interest earned on IOLTA accounts belongs to those whose funds generated the interest.

On May 9, 2001, the Ninth Circuit granted Respondents' petition for rehearing *en banc* and vacated the panel decision. *Id.* 97a. On November 14, 2001, the *en banc* appeals court voted 7-4 to affirm the district court in part, vacate in part, and remand. *Id.* 1a-45a. Initially, the court *sua sponte* addressed Petitioners' standing. The court held that Respondents had confiscated funds belonging to Petitioners Brown and Hayes and thus that those two Petitioners had standing to challenge the IOLTA program. *Id.* 14a.

The court also held that Petitioners Daugs, Maxwell, and WLF lacked standing because Washington had not confiscated any property belonging to them, and thus they had no basis for claiming compensation. App. 15a-19a. Those Petitioners had never, in fact, sought compensatory relief; rather, they had sought injunctive relief. The court's apparent confusion on this point ended up having no effect on its ultimate disposition of their claims, however, because the court held that the injunctive relief sought by Petitioners Daugs, Maxwell, and WLF is not available in Takings Clause cases: "[T]he remedy for the Fifth Amendment violation alleged here is to provide the property owner with just compensation, if a taking has occurred." *Id.* 19a.

Turning to the merits, the court held that Petitioners Brown and Hayes were, indeed, the owners of the interest earned on their IOLTA funds, and it vacated the district court's holding to the contrary. The court rejected Respondents' efforts to distinguish *Phillips*, holding that any differences between Texas and Washington property law with respect to ownership of interest income were "immaterial." *Id.* 24a. The court nonetheless held that Respondents'

confiscation of Petitioners' property did not violate the Takings Clause. First, the court concluded that Petitioners' Takings Clause claims should be judged under the *ad hoc* method of analysis outlined in *Penn Central* rather than the *per se* analysis outlined in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Pet. App. 27a-32a. The court said, "The *per se* analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money." *Id.* 27a. The court thought that application of the *ad hoc Penn Central* approach was especially appropriate in this case because: (1) the property being confiscated from Petitioners was being used to promote the common good, *id.* 29a; and (2) "Given the highly-regulated nature of the banking industry, individuals should expect that their commercial transactions, including their bank deposits, will be regulated." *Id.* 31a.

The court noted that courts applying an *ad hoc* analysis often look to three factors in determining whether a taking has occurred: (1) the economic impact of the government's action; (2) the extent of interference with investment-backed expectations; and (3) the character of the governmental action. App. 32a. Applying those factors, the court concluded that the expropriation of Petitioners' property did not violate the Takings Clause because: (1) the expropriation had no economic impact on Petitioners Brown and Hayes since the expropriated interest would not have come into existence but for the IOLTA program and they had not proven that they were affected by the loss of "earnings credits" on the escrow accounts, *id.* 33a-38a; (2) the expropriation did not interfere with their "investment-backed expectations" since they could not have expected to earn interest on their funds in the

absence of IOLTA, *id.* 38a-39a; and (3) the "character of the government action" could best be "viewed as a regulation of the uses of Brown's and Hayes's property consisting of the principal and the accrued interest in aggregation," not as a confiscation of 100% of the interest income. *Id.* 39a. The court concluded, in light of the highly regulated nature of banking transactions and the ethical obligations of lawyers and LPOs to assist in providing legal services to the indigent, "the IOLTA regulations are not out of character for either the commercial industry or the professions they affect." *Id.* 40a.

Applying the same analysis that led it to conclude that no taking had occurred, the court went on to find, in the alternative, "We . . . hold that even if the IOLTA program constituted a taking of Brown's and Hayes's private property, there would be no Fifth Amendment violation because the value of their just compensation is nil." *Id.* 45a.

The court recognized that by vacating the district court's holding that Petitioners lacked property rights in the IOLTA interest, it had revived Petitioners' First Amendment claims. Rather than addressing the merits of those claims, the court remanded them for initial consideration in the district court. *Id.*

Judge Kozinski dissented, joined by Judges Trott, Kleinfeld, and Silverman. *Id.* 45a-51a. Judge Kozinski argued that this Court's *Phillips* decision required application of *per se* takings analysis to the expropriation of Petitioners' property; he asserted, "*Penn Central*'s *ad hoc* approach deals with regulatory takings -- a difficult and vexing corner of takings law." *Id.* 48a. He endorsed the panel's conclusion that Respondents' actions constituted a compensable taking of

Petitioners' property, stating, "[I]t . . . strikes me as peculiar and quite dangerous to say that the government has greater latitude when it takes money than when it takes other kinds of property." *Id.* 50a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Takings Clause applies in its core application to outright appropriations by the government of a person's property. That is exactly what we have here. Last Term, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002), this Court explained that the regulatory takings cases were not a limitation of the traditional, core meaning of the Takings Clause but its extension to cases where rather than simply seizing the property, the government limits the uses to which the owner can put it, in order to advance some regulatory objective. In such cases, regulation may go "too far" and amount to an appropriation that must be compensated. It is to adjudicate claims of the latter sort that the Court has developed the *ad hoc*, multi-factor *Penn Central* analysis:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.

Tahoe-Sierra, 122 S. Ct. at 1479.

The court below seizes on the single word "physical" in this explanation and similar Court decisions, as if that explanation only applied to tangible property, while money -- the court below keeps insisting -- is fungible. But this misses the whole point of what the Court was getting at. What is at issue is not the nature of the property that was taken, but the character of the government's action. Was it "regulating" in a manner that incidentally limited the uses to which property may be put, or was it simply acquiring the property for government use? Only in the former case is an *ad hoc* analysis appropriate. Here it is captious to say that the IOLTA program limits or "prohibit[s] private uses" of the clients' property. It is simply seizing the interest for a public purpose.

The court below waxes eloquent about how "the availability of interest through the establishment of NOW accounts provided a unique opportunity for the legal profession to further two of its most important ethical obligations -- ensuring that all individuals, regardless of their financial circumstances, have access to the judicial system and segregating client trust funds from the lawyers' own accounts -- without imposing additional societal costs." Pet. App. 6a. What the court failed to explain is why it was appropriate to take *clients'* property in order to further the ethical obligations of their lawyers. Respondents' answer to that question appears to be that this confiscation of the whole of the clients' interest can be justified as regulation. "The IOLTA rules are better viewed as a regulation of the uses of [Petitioners'] property . . . . Banking is a heavily regulated industry . . . . Moreover, the ability to practice a profession -- and the conduct expected of those who do -- is also heavily regulated." Pet. App. 39a. But this ignores the fact (among

others) that it is not the lawyers' or the banks' funds that are confiscated by IOLTA. What we have is a pastiche of familiar phrases found in takings cases without any regard to the circumstances to which they are applied.

The court below congratulates as "prescient" the dissenting opinion's criticism in *Phillips* of this Court's analysis as "skewing the resolution of the taking and compensation issues that will follow." Pet. App. at 10a (quoting *Phillips*, 524 U.S. at 178 (Souter, J., dissenting)). In the eyes of the dissenting justices, the majority's recognition of the plaintiffs' "abstract property right to interest 'actually earned'" on his principal -- severed from the inextricable questions whether a taking occurred and, if so, whether compensation is due -- skewed the Fifth Amendment analysis. *Id.* We agree that *Phillips* largely disposes of the remaining questions in this case, but unlike the court below we accept as a premise what this Court has already said: that the interest in IOLTA accounts *is* the property of the clients. *Phillips*'s analysis inevitably demands that, in this case, we ask the next question: Was that property taken? Those who defend the IOLTA program work mightily to keep that question at bay because, as Justice Souter appears to have recognized, the simple and obvious answer is that it was taken outright, with no regulatory purpose of any sort.

The Court's *per se*, or categorical, takings doctrine recognizes that certain government actions so obviously invade core property rights, thereby shifting public burdens to selected individuals, that no combination of surrounding circumstances can possibly redeem them. Thus, the Court has held that where the government commands a permanent physical invasion of a person's property, or so restricts the

use of the property as to deny it essentially all value, a constitutional taking is made out, without further consideration of related facts such as the economic effects on the owner or any beneficial purpose that the government expects to advance.

The same rationale -- that the character of the governmental action alone demonstrates beyond all doubt that a constitutional taking is being committed -- should lead the Court to hold the Washington IOLTA program to be a *per se* taking. The IOLTA program involves no regulatory purpose of any sort. It simply sets out to raise large sums of money for governmental objectives by singling out the property of certain individuals -- the interest earned on funds deposited by them with real estate professionals in connection with real estate transactions. The individuals thus singled out have no particular connection to the provision of legal services. The only reason that they are required to bear these burdens is that they are within the reach of the bar's disciplinary rules and are unlikely to make a fuss about the small sums being appropriated. This Court ruled in *Phillips* that such interest is the property of the client who owns the principal. It is further clear that no justification has been or can be offered for forcing these isolated individuals to bear the burden of supporting the legal services program which the IOLTA funds go to support. Because the IOLTA program -- which is neither a tax nor a user fee -- is an outright and highly selective seizure of property for governmental purposes, it constitutes a taking whatever other surrounding circumstances may exist.

Because there is only one Takings Clause, and because the *per se* test truncates the fuller *Penn Central* analysis of all

surrounding factors only where those factors cannot possibly alter the conclusion that a taking has occurred, a fuller consideration of the *Penn Central* factors necessarily leads to the same conclusion. The economic impact of the program is to appropriate for government use all the interest belonging to the client, in whatever amount it is earned. The client's reasonable expectation, of course, is that the government will not thus take his money arbitrarily. Respondents' principal answer throughout this litigation has been that the confiscation is permissible because the IOLTA program is responsible for generating this interest in the first place. Not only is the factual basis for this justification substantially disputed on the facts in the record, but the justification itself has already been rejected by this Court in previous cases, including *Phillips*. Plainly the interest at issue here is the property of the clients, and the government does not gain the right to take private property arbitrarily simply because it may have facilitated the creation of that property in some way.

Having established that Respondents have violated the Takings Clause, Petitioners are entitled to a remedy. The money taken from Petitioners has a readily ascertainable value; *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980), mandates that the "just compensation" due is precisely equal to that value. But even if that were not so, there is no basis for denying Petitioners a remedy on the ground that the value of the property taken is not easily quantifiable. Such property rights as the right to exclude others from the use of one's money clearly have *some* value, and the uncompensated taking of those rights amounts to a violation of the Takings Clause.

The Ninth Circuit also held that under no circumstances should Petitioners be awarded equitable relief on their Takings Clause claims. That holding is directly contrary to this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which found that equitable relief is generally available in Takings Clause cases in which the appropriated property is money. When the appropriated property is money, the Court determined that parties should not be forced to endure an "utterly pointless" procedure whereby a property owner must forgo judicial remedies until after his money has been appropriated, and only then sue to require that the money be returned. *Eastern Enterprises*, 524 U.S. at 521 (plurality opinion).

ARGUMENT

I. THE IOLTA PROGRAM VIOLATES PETITIONERS' FIFTH AMENDMENT RIGHTS BY TAKING THEIR PROPERTY WITHOUT JUST COMPENSATION

The Fifth Amendment forbids the taking of private property for public use without just compensation. The purpose of this bar is to prevent the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 123-124 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The Washington State IOLTA program seizes the property of individuals who happen to deposit funds with some real estate professionals or lawyers, and uses that property to fund a general governmental program. Those individuals have no clearer connection to that program than the public at large

which uses and benefits from the legal system. Thus the IOLTA program does exactly what the Takings Clause was intended to prevent. Because its purpose is simply to raise revenue, and not the regulation of conduct, it is plainly unconstitutional. No rational justification has been offered or can be imagined for why these particular individuals should be singled out to bear this public burden.

A. This Court's *Per Se* Takings Test Recognizes That Certain Government Actions So Obviously Invade Core Property Rights, Thereby Shifting Public Burdens to Selected Private Individuals, that No Combination of Surrounding Facts and Circumstances Can Possibly Redeem Them

At the core of the Fifth Amendment's admonition is the prohibition against outright seizures of property. To early constitutional theorists, the prohibitions of the Takings Clause focused on direct appropriations of property, and did not embrace governmental regulation at all. *Lucas*, 505 U.S. at 1028 n.15. As late as the end of the 19th century, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a 'practical ouster of [the owner's] possession,' *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879)." *Lucas*, 505 U.S. at 1014. Still today, as the Court recognized last Term, "[w]hen government condemns or physically appropriates property, the fact of taking is typically obvious and undisputed." *Tahoe-Sierra*, 122 S. Ct. at 1478 n.17. What we have in this case is a direct appropriation of the Petitioners' money.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court went beyond this core prohibition and recognized for the first time that "if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Lucas*, 505 U.S. at 1004 (citing *Pennsylvania Coal*, 260 U.S. at 414-415). In that case, Justice Holmes recognized that absent such a limitation on the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.* at 415. Thus, he concluded, that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

This Court in *Penn Central* identified three factors to serve as guides for evaluating regulatory takings claims:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action.

438 U.S. at 124 (citation omitted). It is clear that these *Penn Central* factors are not exclusive. Rather, they are "important guideposts," *Palazzolo v. Rhode Island,* 533 U.S. 606, 634 (2001) (O'Connor, J., concurring), directing "inquiry into all of the relevant circumstances in particular cases." *Tahoe-Sierra*, 122 S. Ct. at 1485.

The recognition of regulatory takings created the need to distinguish between outright appropriations, where a "clear rule" requiring compensation in all cases is appropriate, and takings that arise from regulatory burdens involving no direct confiscation, which situation "necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Tahoe-Sierra*, 122 S. Ct. at 1479 (quoting *Yee v. Escondido*, 503 U.S. 519, 523 (1992)). *See also Loretto,* 458 U.S. at 440; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 n.18 (1987). In addition to the undisputed need for compensation resulting from literal appropriations -- such as the exercise of eminent domain -- this Court has recognized that the "clear rule" applies in other contexts, including certain governmental actions that are tantamount to an appropriation. In two instances, in particular -- involving permanent physical occupations and regulations that deprive property of essentially all value -- the Court has held, based on review of its own prior cases, that "the character of the government action . . . is determinative" that a taking has occurred. *Loretto*, 458 U.S. at 426; *Lucas*, 505 U.S. 1003. In these instances of *per se*, or categorical takings, the conclusion follows simply from what the government has done, without regard to the injured party's "investment-backed expectations, the actual impact of the regulation on any individual, [or] the importance of the public interest served by the regulation . . . ." *Tahoe-Sierra*, 122 S. Ct. at 1477-78; *see Lucas*, 505 U.S. at 1015.

By distinguishing between cases in which the "clear rule" applies and those determinable only on a broader evaluation of all circumstances, using the *Penn Central* factors, the Court has not created two distinct Takings

prohibitions. There is only one Takings Clause. Rather, in recognizing the existence of *per se* takings, the Court has truncated as unnecessary the *ad hoc* evaluation of all the surrounding facts, in certain instances where the character of the government's action is such that it must be regarded as either an outright appropriation or its "practical equivalent." *Lucas*, 505 U.S. at 1019. Consideration of the *Penn Central* factors is irrelevant in such a case because, by its nature, the conduct amounts to a taking regardless of the interest the government is seeking to advance, or of any other facts that might emerge upon consideration of all of the circumstances. *See Loretto*, 458 U.S. at 426-27; *Lucas*, 505 U.S. at 1015.

B. This Court Should Hold That the Washington IOLTA Program is a *Per Se* Taking Because It is a Simple Appropriation of Property From a Small Number of Individuals to Fund a Government Program of General Application, and No Rationale Has Been or Can Be Offered for Singling Out Those Individuals to Bear that Burden

Washington State's IOLTA program perpetrates an obvious and undisputed taking in violation of the Fifth Amendment. In support of a laudable public goal -- the funding of legal services for those unable to afford them -- it imposes its burden capriciously on some[6] of those who happen to advance funds in connection with real estate transactions or legal services, but on no one else. We know

[6] Indeed, the IOLTA program does not even impose this burden evenly on all of those who place monies on deposit, since large deposits may be placed in a separate account with the interest credited to the client.

from this Court's decision in *Phillips* that the interest seized is the property of the principal holders. We know also that such interest is appropriated outright, and that no explanation has ever been -- or can be -- offered why this haphazardly selected group of real estate or legal clients should bear the public burden of funding indigent legal services, except perhaps the wholly unacceptable explanation that these property owners are unlikely to object in a strenuous or organized way.[7]

We know further that the IOLTA program, unlike zoning or land-use regulations, is not about regulation of private conduct or exercise of the State's police powers, where consideration of the State's legitimate purposes and

[7] It has been observed that a central concern of the Takings Clause is to protect against those cases where a small group of people who can not protect themselves through the political process are required to bear a disproportionate share of a public burden. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 871 (1995). This concern is directly relevant here, where public funding is accomplished by taking small amounts of money from a limited number of individuals, whose only common denominator is the fact of having placed money on deposit in connection with a real estate transaction. The chances are small that an organized political response could be mounted by such a divergent group with minimal amounts individually at stake. And any such political protest would likely be unavailing in any event, since the Washington IOLTA program was not even enacted by the legislature but was created by the State Supreme Court acting at the behest of the State Bar. By contrast, a tax to fund legal services imposed in the usual way by the legislature -- instead of by the state Supreme Court -- would be subject to the usual controls of the political process.

concerns might be appropriate.[8] It is simply about seizing property from one group of persons to support a public program. Accordingly, the IOLTA program is at the very core of what is prohibited under the Takings Clause, and no consideration of government interests or other surrounding circumstances could possibly save it. It should therefore be invalidated as a *per se* taking.

This Court has thus far recognized two categories of governmental action that are the practical equivalent of appropriations and thus are *per se* takings: where the government's action involves a permanent physical occupation, *see, e.g., Loretto*, 458 U.S. at 426, and where the government's action denies a land owner all economically beneficial or productive use of the land. *See, e.g., Lucas*, 505 U.S. at 1015. The Court's approach to these cases and its treatment of these two categories is instructive in evaluating this case, where the government's confiscation of Petitioners' property is also readily recognizable as a *per se* taking.

In *Loretto*, this Court held that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." *Loretto*, 458 U.S. at 426. Considering only the character of the government's action, the Court found that the installation of cable wire and

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[8] After Petitioners filed their motion for summary judgment, Washington argued for the first time that the IOLTA program is aimed at protecting depositors from unscrupulous escrow companies who were "stealing" the depositors' earnings credits. *See* LFofW's District Court Opposition Brief at 17-19. The government cannot justify confiscation of property for its own use to avoid the risk that someone else may steal it if the government does not take it first.

equipment on an apartment building roof -- an action which usually enhances the value of the owner's property -- was a taking requiring compensation. *Id.* at 438. In reaching this conclusion, the Court reviewed its previous decisions dealing with governmental occupation of property. *See id.* at 428-431; *see, e.g., St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 98 (1893) (finding taking where telegraph company poles make "permanent and exclusive" use of the space occupied by the poles). The Court found that it had consistently distinguished between "cases involving a permanent physical occupation on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property . . . on the other. A taking has always been found only in the former situation." *Loretto*, 458 U.S. at 428.

Relying on this history, the Court concluded that the permanent physical occupation of the owner's property by the installation of the cable wire and equipment warranted a finding of a *per se* taking. The Court reasoned that such an act does not simply remove one strand from the bundle of property rights but that it "chops right through the bundle, taking a slice of every strand," in that the traditional property rights recognized in a physical thing (i.e., the rights to possess, use, and dispose) are each effectively destroyed by a permanent physical occupation. *Id.* at 435. The Court was able to thus conclude, from the single fact of a permanent physical occupation, that a taking resulted, "without regard to whether the action achieves an important public benefit or has only a minimal impact on the owner." *Id.* at 434-35.

This Court reached a similar, categorical conclusion in deciding the takings question presented in *Lucas*, where,

unlike the case before the Court, the government acted by regulation rather than outright appropriation. The Court noted that it had historically recognized that where the government's regulation "'*denies an owner economically viable use of his land,*'" no evaluation of other factors is necessary in order to conclude that a taking has occurred. *Lucas*, 505 U.S. at 1015-16 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (emphasis added in *Lucas*)). After reviewing its precedent, the Court concluded that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019 (emphasis in original). It noted that "regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm," and may therefore be the "practical equivalen[t]" of "appropriation." *Id.* at 1017-18. Referencing its prior decision in *Loretto*, the Court found similar categorical treatment appropriate. It qualified this conclusion only to the extent of recognizing that pre-existing, common-law doctrines, such as nuisance, might limit the property interest as to which the claimant might be able to assert a taking; one could not assert a taking with regard to rights of use that were denied by background principles of State law.

In sum, this Court's decisions in *Loretto* and *Lucas* effectively truncate the global balancing prescribed by the *ad hoc, Penn Central* analysis, in certain situations that are close to the heart of the Takings prohibition. Petitioners submit that the unusual facts of this case -- where, in order to fund

government programs of general application, the government simply takes property from a few individuals and can offer no rational explanation for singling them out -- presents a proper predicate on which to find a categorical taking.

To be sure, the present case involves the taking of personal property rather than real property. But the rights to personal property are no less valuable than rights in real property. The government may not take randomly selected citizens' cars for public use without a reason. There may be times when it can do so based on some rational justification -- such as reasonable suspicion of illegal activity, unpaid tickets, or for driving while intoxicated. But it may not do so simply to avoid buying a car for the official car pool with state funds. The right to money is no less valuable than any other real or personal property. Indeed, as the universal medium of exchange, its value is most easily determined.

Nor can Respondents justify the IOLTA seizures on the basis of any traditional governmental power. Government has a broad and general power of taxation, and is not constrained by any specific theory of equity from imposing general assessments that are able to survive the political process. This in no way justifies the sort of drive-by taking at issue here, where the assets of a few are grabbed because they come conveniently to hand. Respondents have never claimed – and surely will not claim in this Court – that the IOLTA seizure is a tax.[9] Nor has anyone ever suggested --

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[9] The power to tax "is not within the scope of the judicial power . . ." *South Dakota v. North Carolina*, 192 U.S. 286, 319 (1904). *See also Meriwether v. Garret*, 102 U.S. 472, 515 (1880) ("The levying of

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as indeed they could not -- that it is some sort of user fee. *Cf. United States v. Sperry Corp.*, 493 U.S. 52, 60-64 (1989); *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-163 (1980). This burden falls upon particular property owners based on the happenstance of placing small amounts of money with a real estate or legal professional, and has nothing to do with the property owner's decision to utilize the legal system, or any other service for which a fee might arguably be charged. Nor, obviously, may the seizure be justified under the government's forfeiture power, which this Court has recognized as legitimate in various circumstances and unrelated to the power of eminent domain. *Cf. Bennis v. Michigan*, 516 U.S. 442, 452 (1996).

Nor do Respondents offer any other explanation for why the targets of the IOLTA assessment should be made to bear the burden of funding the bar's legal services program. This case is thus a far cry even from the situation in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where a portion of the Coal Health Benefits Act was found invalid as a taking

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[9](...continued)
taxes is not a judicial act . . . It is a high act of sovereignty, to be performed only by the legislature upon consideration of 'policy, necessity, and the public welfare."). As an enactment of the Washington State Supreme Court at the behest of the Bar Association, IOLTA clearly fails that test of a tax. Further, while legislatures have broad discretion in structuring classifications for tax purposes, such classifications must satisfy rational basis scrutiny. *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992). As an utterly arbitrary and opportunistic assessment, the IOLTA seizures could not survive even that low level of scrutiny.

by a four Justice plurality of this Court,[10] under a *Penn Central* analysis, notwithstanding the efforts of the Act's sponsors to rationalize the monetary assessment there based on the historic role of the obligated parties as members of a coal industry which made moral commitments to miners to ensure lifetime health benefits.

We are presented here with the admittedly unusual -- but we submit far clearer -- situation of a pure appropriation of property, with no regulatory purpose, whose burden is allocated in a manner having no conceivable rational basis, other than the practical ability to reach the property. The fact that payment of money is sometimes required by the government for taxes, for user fees, or on the basis of pre-existing relationships or obligations, does not make outright monetary appropriations anything other than takings -- pure and simple -- where no such justification or regulatory purpose is present. On the present facts, the application of the "clear rule" -- the *per se* rule that an unconstitutional taking has occurred regardless of the use to which the money will be put or any other facts that may be argued -- is entirely appropriate. Indeed, Petitioners submit that two characteristics of the IOLTA program make it a stronger candidate for such treatment than either *Loretto* or *Lucas*.

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[10] Justice Kennedy did not join the plurality's approach to the takings issues because the Act at issue did not "appropriate, transfer or encumber an estate in land . . . or even a bank account or accrued interest." *Eastern Enterprises*, 524 U.S. 498, 540 (Kennedy, J., concurring in judgment and dissenting in part). That objection is inapposite in the context of the IOLTA program, where a "specific property right or interest," *id.* at 541, is taken. It is the property right in the interest earned on deposited funds that this Court recognized in *Phillips*.

First, it is an outright confiscation, not a use limitation or partial invasion of property rights, and thus falls at the very heart of the Taking Clause's original meaning. Second, the invasion of Petitioners' property rights is the very purpose of the government's action, and not an incidental consequence of otherwise legitimate regulatory action. This is simply a funding program. That Respondents have beneficial plans for the money thus seized offers no ground for making some people bear the burden but not others. For these reasons, it is difficult to imagine a case in which a *per se* analysis is more clearly justified.

Following the lead of *Loretto* and *Lucas* in looking for guidance in earlier decisions of this Court on similar facts, there is clear precedent for categorically invalidating outright appropriations of money from a small group of individuals, for no regulatory purpose but simply to fund activities with which they have no special connection. In *Webb's,* this Court held that the government could not confiscate interest from accounts held by court clerks. *Webb's*, 449 U.S. at 164. Because "the exaction is a forced contribution to general government revenues, and it is not reasonably related to the costs of using the courts," *id.* at 163, the Court rejected the attempt to confiscate the interest as "the very kind of thing the Takings Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power." *Id.* at 164. The selection of payors in the IOLTA program is no less arbitrary than that in *Webb's* and the result here should be the same.

The character of the government's action -- opportunistic confiscation of property from a small group of individuals who happen to be within reach of the State Bar,

to fund a program of general application -- is the only fact that needs to be evaluated to determine that the IOLTA program is a taking. This is the "'classic taking' in which the government directly appropriates private property" described by this Court in *Eastern Enterprises*, 524 U.S. at 522, and *Tahoe-Sierra*, 122 S. Ct. at 1480. By outright seizure, the IOLTA program "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. The IOLTA program should be invalidated as a categorical taking.

C. Full Consideration of the *Penn Central* Factors Confirms that the IOLTA Program is a Taking

The IOLTA Program should be invalidated as a *per se* taking precisely because, given the character of the program, no combination of governmental interests or other surrounding facts and circumstances can possibly provide a basis for sustaining it. If that is correct, it follows that an actual consideration of the *Penn Central* factors -- (1) the character of the government action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations -- must lead to the same result. *See Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-46 (1992).

In this regard, Respondents' principal argument has been to suggest a comparison between the situation of clients in the pre-IOLTA world with the situation under IOLTA, and to argue that in some or perhaps many instances, the claimant would not have realized any interest on his money without IOLTA. Accordingly, they disagree with the discussion above about the character of the governmental action, and

most emphatically argue that the other two *Penn Central* factors -- the economic impact and the effect on reasonable investment-backed expectations -- weigh in favor of sustaining the program. Petitioners have never conceded the underlying factual contention that they could have realized little or no value from their funds in the absence of IOLTA, and do not do so now.[11] Even if Respondents' contentions were true, the IOLTA program would be a taking nonetheless.

First, the proper context for assessing economic impact and the effect on Petitioners' legitimate expectations is the world as it is, not a comparison of that world with a hypothetical pre-IOLTA world in which it is alleged that no interest could be earned. The government does not gain the right to take private property arbitrarily simply because it has facilitated the creation of that property in some way. Respondents' argument to the contrary ultimately rests on the argument that interest on IOLTA accounts is "government created value" to which petitioners can have no claim. That contention was laid to rest in *Phillips*:

[11] Petitioners demonstrated in their motion for summary judgment that after the 1995 expansion of the IOLTA program to cover real estate transactions, Washington banks responded by eliminating or reducing "earnings credits" on escrow accounts; and that escrow companies responded in turn by imposing an "IOLTA fee" on real estate transactions and/or by increasing basic fees charged to their customers. Pet. App. 111a-112a. In particular, Petitioners demonstrated that the bank into which Petitioner Hayes's IOLTA funds were deposited in August 1996 had, prior to August 1996, ceased paying earnings credits on escrow accounts in response to the 1995 expansion of the IOLTA program. JA51-52.

> The value [of IOLTA interest] is created by respondent's funds. The Federal Government, through the structuring of its banking and taxation regulations, imposes costs on this value if private citizens attempt to exercise control over it. Waiver of these costs if the property is remitted to the State hardly constitutes "government-created value."

524 U.S. at 171.[12]

In the real world, where IOLTA exists and where this Court has already determined that the interest accrued on the client's money is the client's property, those clients have an eminently reasonable expectation that it will not be taken by the government arbitrarily. The economic impact of the government action is to deny this expectation, thereby preventing the client from enjoying any benefit from the interest, and transferring that benefit to the government.[13]

[12] This conclusion was unsurprising following the Court's decision in *Webb's*. There, this Court rejected the Florida Supreme Court's reasoning that the interest accrued was not property of the depositor because "the statute 'takes only what it creates.'" *Webb's*, 449 U.S. at 163. "The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* at 164. The Court held that Florida's attempted appropriation of interest generated by funds deposited in a court registry violated the Takings Clause, stating unequivocally that "the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest." *Id.* at 162.

[13] Respondents have attempted in the past, *see* LFofW's Ninth Circuit Brief at 35-36, to support the conclusion of no taking by reference to this Court's case law on the proper measure of

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This conclusion is not undermined by the facts that individuals do not generally place funds with their lawyers or real estate professionals for investment purposes, or that the amount of interest may be small. "[T]he Fifth Amendment draws no distinction between grand larceny and petty theft." *Hodel v. Irving*, 481 U.S. 704, 727 (1987) (Stevens, J. concurring). Indeed, the size of the seizures is part of the program's insidious and objectionable character; small takings may go unnoticed and unopposed. Moreover, in light of the interest-follows-principal rule, Petitioners have a very legitimate expectation that the interest earned on their funds will not be confiscated from them.

Second, even on the mistaken assumptions that relevant expectations and economic impacts should be evaluated by comparison to the hypothetical pre-IOLTA world, and that

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[13](...continued)
compensation, and noting that government need not, in eminent domain proceedings, compensate for enhanced valuations that are the product of the government's own actions. *See United States v. Fuller*, 409 U.S. 488, 492 (1973); *United States v. W.G. Reynolds*, 397 U.S. 14, 21 (1970); *see also Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1948) (measure of compensation is the loss to the property owner, not the "gain to the taker"). Obviously, the issue of whether there is a taking is legally distinct from the question of remedy, and specifically of what compensation, if any, may be due. This Court's decision in *Loretto* makes clear that a *per se* taking by permanent physical occupation may occur through actions that actually enhance the overall value of the property in issue. *Loretto*, 458 U.S. at 437 n.15 (noting that arguments about whether the government's invasion actually enhanced the value of the property are relevant to determining the amount of compensation but not the fact of a taking). Moreover, the *Kimball Laundry* line of decisions has never been invoked to deny *all* relief to those whose property has been confiscated, particularly where (as here) the property has such readily ascertainable value.

IOLTA takes no economic value that would have existed in its absence, the program would still constitute a taking. For owners of funds in IOLTA accounts also have valuable, non-economic rights in their property which must be protected from undue government interference. This Court has long recognized that "property is more than economic value." *Phillips*, 524 U.S. at 170. "[I]t also consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of it.'" *Id.* (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). Here, even if the interest had little or no economic value, "possession, control, and disposition are nonetheless valuable rights that inhere in the property." *Id.*; *see also Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (the right to exclude others is one of the most essential sticks in the bundle of property rights). The IOLTA program's interference with these rights interferes with the owners' legitimate expectations -- based on their ownership of the money -- in a fundamental way.

The IOLTA program constitutes a taking whether viewed as a *per se* taking or analyzed under the *Penn Central* factors. In reaching this conclusion, the Court need not address any of the difficult issues that arise at the margin between legitimate government regulation and exercises of the police power that burden property unduly. IOLTA does not involve governmental regulation of land or conduct of any sort. It is simply a funding program which singles out certain people -- opportunistically and capriciously -- to bear general government burdens. This is precisely what the government is not allowed to do under the Constitution. The laudable purpose to which the funds are put is wholly irrelevant to the decision at hand.

D. The Ninth Circuit's Summary Judgment Ruling that No Compensation was Due is Wrong for Several Reasons

The Ninth Circuit held that "[b]ecause of the way the IOLTA program operates, the compensation due Brown and Hayes for any taking of their property would be nil." Pet. App. 41a. It went on to conclude that, as a result, even if the government had taken property, it had not violated the Fifth Amendment because no compensation was due.

But, of course, as just stated, what the Legal Foundation of Washington has done is to appropriate interest of a certain, specific amount, which undoubtedly belongs to the claimants. The reasoning of the court below depends on the rationale rejected in *Webb's*, 449 U.S. at 163, that a statutory seizure is permissible simply because it "takes only what it creates." The compensation due here is exactly equal to the amount taken, and thus the court below is plainly wrong in saying that compensation due is nil.[14]

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[14] Even if compensation due were determined by comparison of claimants' purely economic situations in the hypothetical pre-IOLTA and the real post-IOLTA worlds, the Ninth Circuit still erred, because there is a genuine issue of material fact concerning that issue. On summary judgment, Petitioners presented evidence of the value of the earnings credits that would have been applied to their real estate transactions absent the IOLTA program. JA 51-52. This evidence was sufficient to raise an issue of fact. The trial court did not reach the question of how much compensation would be due if a taking had been found because it held, contrary to *Phillips*, that Petitioners did not have a property interest in IOLTA-based interest. Pet. App. 94a-96a. Although it recognized that the "no property interest" holding could not stand in light of *Phillips*, *id.* 22a-25a, the Ninth Circuit failed to credit

(continued...)

Even if this were not so, and all that the claimant's lost was a right of less clearly determinate value, here to control the uses to which their property is put, *Phillips*, 524 U.S. at 170, that fact would not mean that no compensation was due, or that the government could simply take such property with impunity. Simply because a particular property interest -- like the right to control one's money, or a letter or family heirloom -- has no readily determinable fair market value, does not mean it has no value, or that no constitutional remedy is available. Such property rights as the right to exclude others from the use of one's money clearly have *some* value, even if that value is not easily quantified. A government that confiscates private property in violation of the Takings Clause should not be heard to argue that the property owner is entitled to no remedy -- neither compensatory damages nor equitable relief -- simply because of the difficulty in measuring the property owner's loss with precision.

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT EQUITABLE RELIEF IS NOT AVAILABLE TO REMEDY TAKINGS CLAUSE VIOLATIONS

The Ninth Circuit held that under no circumstances should Petitioners be awarded injunctive relief on their Takings Clause claims. Rather, "the remedy for the Fifth Amendment violation alleged here is to provide the property owner with just compensation, if a taking has occurred." Pet. App. 19a. Because Petitioners Daugs, Maxwell, and WLF

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[14](...continued)
Petitioners' evidence regarding lost earnings credits. Thus the decision of the Ninth Circuit is wrong for this reason as well.

claimed neither that they had suffered monetary losses nor that they were entitled to an award of damages,[15] the appeals court held that they lacked Article III standing and dismissed their claims on that ground alone. *Id.* 15a-19a.

Thus, the issue of the availability of equitable relief in a Takings Clause claim of this sort is squarely presented to the Court. The appeals court erred in holding that equitable relief is unavailable. The property allegedly seized in violation of the Fifth Amendment is money. Moreover, the Ninth Circuit explicitly found that the State of Washington has not afforded Petitioners an adequate means of pursuing their compensation claims. *Id.* 19a-21a. Under those circumstances, Petitioners are entitled to injunctive relief in order to protect their Fifth Amendment rights.

A. Equitable Relief Is Generally Available in Takings Clause Cases in Which the Appropriated Property Is Money

The property taken from IOLTA depositors by Respondents is money. This Court and other federal courts have held that in such cases, equitable relief is the most appropriate means of remedying any Takings Clause violation.

This issue arose most recently in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Eastern, a former coal operator, challenged the constitutionality of the Coal Industry Retiree

[15] Rather, all three Petitioners sought equitable relief only.

Health Benefit Act of 1992 (the "Coal Act"),[16] arguing *inter alia* that the Coal Act violated its rights under the Takings Clause by requiring Eastern to pay the health care and retirement benefits of certain former coal workers who had never been employed by Eastern. The Court initially addressed a jurisdictional issue: whether Eastern acted properly in filing a declaratory judgment action in district court or whether it should have filed suit initially in the Court of Federal Claims under the Tucker Act.[17] The Court sided with Eastern, finding that the federal district courts have jurisdiction to hear a Takings Clause claim for equitable relief against the federal government, notwithstanding the existence of the Tucker Act, where the property at issue is money. *Id.*, 524 U.S. at 519-22 (plurality opinion).[18]

[16] 26 U.S.C. §§ 9701 *et seq.*

[17] The Tucker Act grants exclusive jurisdiction to the U.S. Court of Federal Claims to render judgment upon any claim against the United States for money damages exceeding $10,000 that is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

[18] None of the other *Eastern Enterprises* opinions took issue with the plurality's analysis of the equitable relief issue. In the absence of any dissenting views, the plurality can reasonably be deemed to have expressed the views of the Court. Moreover, even the United States government, in its *Eastern Enterprises* brief, supported the availability of equitable relief in cases involving the appropriation of money, and the government's analysis of the issue was virtually identical to the one ultimately adopted by the Court. *See* Brief for the Federal Respondent at 38-39 n.30.

The Court explained that in Takings Clause cases involving "a direct transfer of funds" rather than the imposition of burdens on real or tangible personal property, requiring a property owner to submit "a claim for compensation 'would entail an utterly pointless set of activities.'" *Id.* at 521 (quoting *Student Loan Marketing Ass'n v. Riley*, 104 F.3d 397, 401 (D.C. Cir.), *cert. denied,* 522 U.S. 913 (1997)). The Court said that it made little sense to defer resolution of the Takings Clause issue by limiting the property owner to a suit for compensation after his money has been transferred to the government, because the government would end up refunding to successful claimants the very money that it had previously appropriated. *Id.* While *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984), established the general rule that Congress should be presumed to have intended that claims for compensation against the United States be brought in the Court of Federal Claims before any Takings Clause claim could be asserted in district court (in the absence of a statute repealing Tucker Act jurisdiction in specific instances), *Eastern Enterprises* reversed that presumption in cases involving the direct transfer of funds. *Id.* The Court was unwilling to believe that Congress intended to require claimants and the federal government to go through the "utterly pointless set of activities" that Court of Federal Claims filings would entail. *Id.* Rather, Takings Clause claimants such as Eastern are permitted to seek equitable relief in federal district court, in the absence of direct evidence that Congress intended a contrary result. *Id.*

The plurality recognized that no prior Court decision had explicitly endorsed the jurisdictional rule adopted by its decision. The plurality noted, however, that its rule was

consistent with the Court's actions in numerous previous cases in which it had exercised jurisdiction over claims for equitable relief under the Takings Clause:

> [I]n situations analogous to this case, we have assumed the lack of a compensatory remedy and have granted equitable relief for Takings Clause violations without discussing the applicability of the Tucker Act. See, *e.g., Babbitt v. Youpee,* 519 U.S. 234, 243-245 (1997); *Hodel v. Irving*, 481 U.S. 704, 716-718 (1987). Without addressing the basis of this Court's jurisdiction, we have also upheld similar statutory schemes against Takings Clause challenges. See *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.,* 508 U.S. 602, 641-647 (1993); *Connolly,* 475 U.S. at 221-228. "While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, neither should we disregard the implications of an exercise of judicial authority assumed to be proper" in previous cases. *Brown Shoe Co. v. United States,* 370 U.S. 294, 307 (1962) (citations omitted).

Eastern Enterprises, 524 U.S. at 521-22.

The plurality's decision is fully consistent with other cases that have addressed the availability of injunctive relief in a Takings Clause claim against the federal government involving the direct transfer of funds. *See, e.g., Riley,* 104 F.3d at 401; *In re Chateaugay Corp.,* 53 F.3d 478, 492-93 (2d Cir. 1995). *See also Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 71 n.15

(1978) (the Declaratory Judgment Act "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.").

Eastern Enterprises's rationale is equally applicable to Takings Clause claims filed against a State or local government. Requiring IOLTA depositors to wait until after their funds have been appropriated to file suit for just compensation would entail the same "utterly pointless set of activities" decried by *Eastern Enterprises*. Such a process would be particularly pointless in light of the huge volume of IOLTA transactions that take place in Washington State on a daily basis. Individuals such as Petitioners Hayes and Brown -- who engage in real estate transactions on a regular basis -- if limited to suits for compensatory damages, would need to file several suits per year in order to ensure full compensation.[19] Similarly, if the IOLTA program is held to violate the Takings Clause, Washington State could be required on thousands of occasions annually to refund some or all of the very money it had just collected, along with any other damage awards and attorney fees awarded under 42 U.S.C. § 1988. Under those circumstances, *Eastern Enterprises* indicates at the very least that injunctive relief is an appropriate remedy in Takings Clause claims filed in federal district court against State IOLTA programs, in the absence of a strong indication in State law that lawmakers

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[19] The burden imposed on IOLTA claimants by the need to file repeated lawsuits would be exacerbated by the small amount of any single claim. In sharp contrast to the small size of any such individual claims, LFofW's aggregation of the confiscated IOLTA funds raises several million dollars each year, a fact of which Respondents are quite proud.

really contemplated refund-by-refund adjudication of Takings Clause claims.

Moreover, the Court appears to have directed the entry of equitable relief against a State government in the one Takings Clause case most closely analogous to this case. In *Webb's,* the Court held that Florida violated the Takings Clause when it confiscated interest earned on private funds deposited in a court registry. *Webb's,* 449 U.S. at 160-64. Rather than simply ordering the payment of compensation to those whose funds were confiscated, the Court declared unconstitutional the Florida statute that authorized courts to confiscate the interest earned on court registry funds. *Id.* at 164-65. Equitable relief is similarly appropriate in this case.

B. When, as Here, a State Government Appropriates Private Property Yet Fails to Provide an Adequate Mechanism for Obtaining Compensation, the Property Owner Is Entitled to an Injunction Against Future Appropriations

Equitable relief is appropriate in this case for the additional reason that Washington State has not provided an adequate *State court* mechanism by which property owners can obtain compensation for property seized by the State.

The Ninth Circuit expressly rejected Respondents' assertion that Petitioners' Fifth Amendment claims were not ripe because Petitioners had not initially sought compensation in Washington State court under Washington's inverse condemnation procedure. Pet. App. 20a-21a. This Court held in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194 (1985),

that a Takings Clause claim is not ripe for federal court review until a State's procedure for seeking just compensation has been utilized. In rejecting Respondents' assertion, the Ninth Circuit explained that *Williamson County*'s ripeness requirement was subject to several exceptions:

> *Williamson* itself held that a plaintiff may be excused from this requirement if he demonstrates that "the inverse condemnation procedure is unavailable or inadequate." [*Williamson County*, 473 U.S.] at 197. In addition, "an exception exists where the state does not have a reasonable, certain, and adequate provision for obtaining compensation at the time of the taking." *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101-02 (9th Cir. 1998).

Pet. App. 21a. The appeals court concluded that the availability of a suit for compensation in Washington State court was not an adequate remedy because any such suit would be "futile." *Id.* The court stated:

> The final authority on a Washington State inverse condemnation proceeding is the Washington Supreme Court. The Justices of the Washington Supreme Court, as parties to the present action, have filed briefs that argue, not just that the claim is unripe, but that there was no Fifth Amendment violation. The Justices do not point to an available state remedy, nor do they suggest that one is needed. Thus, we conclude that requiring [Petitioners] to seek compensation from the State -- a decision reviewable by the State Supreme Court -- would be futile.

Id.[20]

The appeals court nonetheless *sua sponte* dismissed the claims of Petitioners Daugs, Maxwell, and WLF, on the grounds that they lacked standing. The court concluded that even if the Petitioners could establish a Fifth Amendment violation, the only "appropriate relief" in Takings Clause cases of this type "is to provide the property owner with just compensation." *Id.* 19a.[21] In support of its holding that "prospective injunctive relief is an inappropriate remedy here," *id.* 18a, the court relied exclusively on *Williamson County* and *Monsanto*.

The appeals court's conclusion that declaratory and injunctive relief are disfavored remedies under the Takings Clause is a clear misreading of *Monsanto* and *Williamson County*. Those cases impose no restrictions whatsoever on the types of remedies available to a property owner who prevails on a Takings Clause claim. The Court made clear in both cases that a Takings Clause claim is premature so long as the government entity that has appropriated property for a public purpose has made available to the property owner an adequate procedure for seeking compensation. *Williamson County*, 473 U.S. at 195; *Monsanto*, 467 U.S. at 1016-1020. But the Ninth Circuit has ruled that Washington State has *not*

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[20] Respondents did not file a cross-petition to contest the Ninth Circuit's ripeness determination. Accordingly, the propriety of that determination is not before this Court.

[21] As noted above, the court held that, in light of its conclusion that only compensatory relief was available, Petitioners Daugs, Maxwell, and WLF lacked standing because they did not assert any compensation claims.

provided an adequate procedure whereby Petitioners could seek compensation in State court under State law, and that ruling is not subject to challenge in this Court. In light of that ruling, nothing in either *Monsanto* or *Williamson County* suggests that Petitioners are not entitled to the full panoply of remedies in the event that they establish a Takings Clause violation.

In holding to the contrary, the appeals court apparently concluded that because property owners have available to them a procedure for seeking compensation from *State or local governments* under the Takings Clause in *federal* court, they are foreclosed from seeking equitable relief as well. That conclusion is a clear misreading of this Court's case law. The reason that a property owner often is not permitted to seek equitable relief in a Takings Clause case is that "no constitutional violation occurs" so long as the government that has taken private property itself provides an adequate procedure for obtaining just compensation, and that procedure has not yet been utilized. *Williamson County*, 473 U.S. at 194 n.13. But when a State appropriates private property without providing an adequate State procedure for the property owner to seek just compensation, it has violated the Takings Clause. That violation entitles the property owner to file suit in federal court, and nothing in *Williamson County*, *Monsanto*, or *Eastern Enterprises* suggests that such a plaintiff is restricted in the types of relief he may seek.[22]

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[22] Petitioners do not ask the Court to determine the precise relief to which they are entitled as a remedy for Respondents' violations of the Takings Clause. Petitioners ask only that the appeals court's categorical exclusion of equitable relief be reversed. The district court should be instructed on remand that it is free to consider granting such relief.

The Ninth Circuit's holding to the contrary suggests that States are free to violate the Takings Clause repeatedly with impunity because, after all, property owners can always be made whole by filing a federal court action for compensatory relief.[23] No decision from this Court has so held. States and their officers are expected to conform their conduct to the dictates of the Constitution. Indeed, if a state official were to persist in operating an IOLTA program after a decision holding that the program violated IOLTA depositors' Fifth Amendment rights and ordering compensation, that official could be liable for payment of punitive damages. *See, e.g., Smith v. Wade,* 461 U.S. 30, 55-56 (1983). States are not free to continue practices found to violate the Takings Clause simply because they are willing to pay damages; rather, federal courts are authorized to grant injunctive and declaratory relief to ensure that such practices do not continue.

In sum, the Ninth Circuit erred in holding that the only "remedy for the Fifth Amendment violation alleged here is to provide the property owner with just compensation, if a taking has occurred." Pet. App. 19a.

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[23] Property owners' ability to be made whole in a federal court action against a State government is subject to severe restrictions. Under the Eleventh Amendment, a State generally cannot be sued for compensatory relief in federal court. Petitioners note that Respondents raised an Eleventh Amendment defense in their answer to the amended complaint and have never withdrawn it. JA 39. Thus, fully protecting Petitioners' property rights will almost surely require entry of injunctive and declaratory relief.

CONCLUSION

Petitioners respectfully request that the judgment of the Ninth Circuit be reversed. The case should be remanded with directions that Petitioners' motion for summary judgment be granted and that the district court enter appropriate compensatory and equitable relief for Petitioners.

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Date: August 22, 2002

(17)

FILED

OCT 18 200

OFFICE OF THE CLERK

No. 01-1325

In The

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ET AL.,

Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENTS LEGAL FOUNDATION OF WASHINGTON AND ITS PRESIDENT

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October 18, 2002

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QUESTIONS PRESENTED

1. Whether Washington's IOLTA ("Interest on Lawyer Trust Account") regulations "take" private property without payment of just compensation within the meaning of the Just Compensation Clause of the Fifth Amendment.

2. Whether injunctive relief is an available remedy under the Just Compensation Clause for a "taking" that does not result in any financial loss to the plaintiff.

CORPORATE DISCLOSURE STATEMENT

Respondent Legal Foundation of Washington has no parent corporation, and no publicly owned company owns any stock in it.

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or necessary to allow the banks to retain all the earnings that arose as a result of the pooling of client funds in non-interest lawyer trust accounts. Accordingly, some states began expressly to require lawyers to place client funds in accounts with eligible banks that would, when possible, pay positive net interest to the clients. That still left situations, small or short-term deposits, where the bank would not pay interest in excess of fees and other charges to the client.

States enacted rules requiring lawyers to place the funds that could not earn net interest for their clients in pooled accounts with banks that agreed to pay at least some amount of interest to a fund for improving access to the legal system. Starting with Florida and ending, after *Phillips v. Washington Legal Found.*, 524 U.S. 156, 160 n.1 (1998), with Indiana, every state and the District of Columbia have implemented such IOLTA regulations.

Washington first adopted IOLTA regulations in 1984. *IOLTA Adoption Order*, 102 Wn.2d 1101 (1984), JA 148; *see also* Washington Rule of Prof'l Conduct ("RPC") 1.14, Pet. App. 99a. The rule does not require that clients turn funds over to lawyers, but applies once the client voluntarily decides to do so. At that point, the client does not control where the lawyer places the funds.[1] If a deposit controlled by a lawyer is capable of providing "a positive net return to the client," then the lawyer must deposit the

[1] The lack of client control is key for federal income tax purposes. *See* Rev. Rul. 87-2, 1987-1 C.B. 18 (ruling that interest generated by an IOLTA account does not constitute income of the client or lawyer "because neither the clients nor the lawyers have control over . . . such interest") (amplifying Rev. Rul. 81-209, 1981-2 C.B. 16). If clients have the option of deciding whether their funds would be placed into an IOLTA account, the IRS is likely to deem all net interest on IOLTA accounts taxable income of all clients whether they object to IOLTA or not.

funds with an eligible bank in an account in which interest will be paid to the client.[2] RPC 1.14(c). In adopting Washington's IOLTA regulations, the Washington Supreme Court "ma[de] clear that those funds available for the IOLTA program are those funds that cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client." JA 149. The net interest generated from these accounts is provided to Respondent Legal Foundation of Washington ("LFW"), a nonprofit organization established by the Washington Supreme Court, RPC 1.14(c)(4), for "a laudable public goal – the funding of legal services for those unable to afford them." Pet. Br. at 22.

The IOLTA rules do not perform alchemy. Rather, an IOLTA account generates positive income on pooled funds, which otherwise could not generate net interest, by eliminating the costs associated with separately tracking each transaction (including, for instance, when each check clears the issuer's bank), and then allocating tiny gross amounts of interest to each individual client. In addition, an IOLTA account avoids certain charges (for instance, tax reporting for each individual client) that would be incurred even if it were economically rational to allocate the gross recovery to each individual client. These economic

[2] In particular, the lawyer must determine whether the funds could earn net interest for the client if placed in a non-IOLTA account, or even in a "pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client." RPC 1.14(c)(2). "Sub-accounting is a banking product where an entity such as a law firm opens a master account in its name and a linked sub-account for each client for whom the firm is holding funds." *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 639 (W.D. Tex. 2000), *rev'd*, 270 F.3d 180 (5th Cir. 2001), *reh'g, en banc, denied*, 293 F.3d 242 (5th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3092 (June 26, 2002) (No. 02-01) (the *"TEAJF"* case).

forces combine to create net income in an IOLTA account that could not be generated for the individual clients whose funds are pooled in the account. *See* Brief for Forty-Nine State Bar Associations and the National Association of IOLTA Programs as Amici Curiae in Support of Respondents.

3. Washington's Extension of Its IOLTA Rules to Non-Lawyers Licensed to Prepare Legal Documents

Preparation of real estate sales documents constitutes the practice of law in Washington. *Hagan & Van Camp v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 635 P.2d 730 (1981). Rather than require the involvement of lawyers in real estate transactions, the Washington Supreme Court adopted Washington Admission to Practice Rule ("APR") 12, 98 Wn.2d 1101 (1982), Pet. App. 103a, which provides for the licensing of certified closing officers, commonly known as Limited Practice Officers ("LPOs").[3]

Like lawyers and their firms, escrow or title companies that employ LPOs often temporarily control client funds. *See, e.g.*, JA 56. Before the IOLTA rules were extended to LPOs, escrow companies routinely deposited all client funds in non-interest-bearing accounts, Pet. App. 110a; Pet. Br. at 5; *see* JA 85, 111, often at institutions selected for the benefits they indirectly provided to the escrow company. Even after the authorization of NOW accounts, escrow companies routinely placed all client funds in non-interest-bearing accounts due to "the inconvenience of subaccounting for interest earned by multiple depositors." Pet. Br. at 5. As a result of placing their

[3] This brief refers to lawyers and LPOs collectively as "legal practitioners."

clients' funds in non-interest-bearing accounts, affiliates of escrow companies often received an indirect benefit known as "earnings credits." Some banks provide earnings credits to an affiliate of an escrow company in return for the escrow company steering trust accounts to the bank. The "credits" relate to the balance in the escrow company's trust accounts, and the bank allows these credits to offset bank charges on other transactions, or uses the credits to pay the affiliate for accounting services the affiliate provides to the escrow company.[4] The Washington State Bar Association identified the self-dealing spurred by earnings credits as a reason to extend the IOLTA rules to LPOs. JA 143.

In 1995, the Washington Supreme Court adopted APR 12(h) and APR 12.1, which applied the IOLTA rules to LPOs. 127 Wn.2d 1145 (1995); Pet. App. 104a. Like lawyers, escrow companies utilizing LPOs are now required to deposit client funds in an IOLTA account only when an interest-bearing account with subaccounting will not provide a positive net return to the client. APR 12.1(c)(2)(iii).

4. Application of the IOLTA Rules to Petitioners

Petitioners Brown and Hayes are clients who used the services of LPOs and had small or short-term deposits placed in IOLTA accounts. Petitioners did not file the case

[4] A set of agreements laying out the relationship between the bank, the escrow company, and the escrow company affiliate appears at JA 62-75. The bank grants the earnings credits to the escrow company affiliate, not the escrow company, because banks are forbidden from "directly or indirectly" paying any interest on demand deposits. 12 C.F.R. § 217.3. Despite the term "indirectly," the Federal Reserve Board has interpreted this regulation as permitting banks to pay benefits to an affiliate of the depositor, so long as the affiliate is not the depositor's subsidiary. JA 78.

as a class action. The focus of this case is on Brown's and Hayes' interaction with the IOLTA rules.

The other plaintiffs consisted of one LPO (Daugs) who refuses to comply with Washington's IOLTA rules, a former LPO (Maxwell) who surrendered her LPO license to avoid the IOLTA rules, and an advocacy group (the Washington Legal Foundation, or "WLF"). As discussed below at section III.A, these parties have not challenged the Ninth Circuit's determination that they lack standing. *See* Pet. App. 12a-19a (ruling that LPOs had no claim to interest because they did not own the principal deposited in IOLTA accounts and that WLF lacked representational standing); *see also TEAJF*, 270 F.3d at 188 (only the client, not the legal practitioner, has any claim). We discuss the record regarding the LPO Petitioners only because it provides insight into the practices of escrow companies and how the IOLTA rules work.[5]

a. Brown and Hayes

In connection with a purchase of real property, Brown delivered $90,521.29 to Land Title Company in April 1997. JA 53, 130. Land Title deposited these funds in an IOLTA account at Skagit State Bank, which paid LFW 1% interest and granted earnings credits that indirectly benefited Land Title. *Id.* 130. Brown's transaction closed two days later. *Id.*

At 1% interest, LFW received less than $5 on Brown's deposit (assuming the funds earned interest during the entire two days they were on deposit), less any "reasonable check and deposit processing charges" imposed by the

[5] This brief refers to Daugs and Maxwell together as the "LPO Petitioners," and to Daugs, Maxwell, and WLF collectively as the "Non-Client Petitioners" to distinguish them from Brown and Hayes.

bank. APR 12.1(c)(1). Brown submitted no evidence that LFW had a net gain from his deposit, nor did he submit any evidence that his legal practitioner could have or, in the absence of the IOLTA rules, would have placed this two-day deposit in a bank account that would have earned a positive net return for Brown. If Brown's legal practitioner could have earned a positive net return for Brown on his funds, Washington's IOLTA rules prohibited the deposit in an IOLTA account. APR 12.1(c)(3). Brown admitted that "[w]ithout IOLTA in place I may not have earned anything." JA 130.

In addition to being a client, Brown was an owner and officer of Land Title Company and another similar company that employs LPOs. JA 126-27. He admitted that the stockholders of escrow companies benefited from earnings credits. *Id.* 130-31. Brown believed that escrow companies charged higher fees after the implementation of the IOLTA rules, but he produced no evidence to support this subjective belief.[6]

On August 14, 1996, Hayes delivered $1,000 to Fidelity National Title Company, which constituted Hayes' share of an earnest money deposit. JA 54, 117-18. Hayes did not expect to earn interest on his deposit. *Id.* 120. These funds were placed in an IOLTA account. *Id.* 50. On August 28, two days before closing, Hayes delivered an additional $6,396.66, his portion of the remainder of the purchase price. *Id.* 54. Hayes assumed that Fidelity deposited these funds in the IOLTA account as well. *Id.* 120.

[6] As Brown testified, "[D]on't ask me how much but I mean I think that's what I was driving at, I think our fees would be higher." JA 133. Brown also "believed" that some benefit of earnings credits provided to escrow company affiliates was passed on to clients, but again he was not certain that this occurred or to what extent. *Id.* 131-33.

Even at 2%, *gross* interest on the two deposits by Hayes was less than $2. That is what Hayes believes was "taken" from him as a result of the IOLTA rules. JA 123-24. Hayes submitted no evidence that LFW had a net gain from his deposit, nor did he submit any evidence that his legal practitioner could have or, in the absence of the IOLTA rules, would have earned a positive net return for Hayes. Moreover, if that were possible, his legal practitioner acted in violation of the IOLTA rules in having the money deposited in an IOLTA account.

Like Brown, Hayes "believe[s]" that the IOLTA rules result in higher fees for escrow services, JA 124, but he also produced no evidence to support his subjective belief.[7] Petitioners submitted an affidavit from an LPO at Fidelity in which she stated that the bank used by Fidelity ceased paying earnings credits after the implementation of the IOLTA rules. However, she did not state that Fidelity had raised its rates as a result, or that Hayes paid more for Fidelity's services than he would have prior to the IOLTA rules. *Id.* 50-52.

Neither Brown nor Hayes attempted to establish directly, or through more than conclusory assertions, that he suffered any economic loss as a result of the IOLTA rules. In fact, neither did. And, although Petitioners assert

[7] Hayes acknowledged that he did not "have any idea" whether he had been charged additional fees by his escrow company as a result of the IOLTA rules. JA 124. He also admitted that he did not consider the title company's fees in deciding which title company to use. *Id.* 119. He had no information about how Fidelity set its escrow fees or whether those fees had risen as a result of IOLTA. *Id.* 121, 124. As the LPO Petitioners admitted, companies base escrow fees on market conditions, not on small variations in the cost of doing business. *Id.* 87-88, 96-97, 100. The sworn declaration of the only qualified expert on this economic issue (Keith Leffler) established that Petitioners' speculation as to the impact of earnings credits on escrow fees has no economic basis. *Id.* 135-38.

that neither Brown nor Hayes consented to the deposit of their funds in IOLTA accounts, neither Brown nor Hayes alleged that he attempted to put any restrictions on where his legal practitioner placed his funds, or that he objected at the time to their placement in an IOLTA account.

b. Daugs and Maxwell

Daugs is an LPO who owns an escrow closing company (SeaTac Escrow) and an affiliated nonsubsidiary company (SeaTac Systems) that provides accounting services only to SeaTac Escrow. JA 81-83. The fees SeaTac Systems charges are paid by Columbia State Bank, where SeaTac Escrow has accumulated earnings credits by steering client funds into accounts that pay Daugs' clients no interest. *See id.* 62-75.

In ten years, Daugs' clients have never put any limitations on the use of their funds. JA 91-92. Daugs never placed any client funds in an IOLTA account. *Id.* 86. Despite that, none of his clients have ever received interest because he deposits all client funds in a non-interest-bearing account in violation of the IOLTA rules. *Id.* He asserts that if he complied with the IOLTA rules, and if the bank cut off earnings credits, he would have to raise his escrow fees or go out of business. *Id.* 89-90. Daugs submitted no evidence of what it actually costs SeaTac Systems to perform the accounting services or even how much profit SeaTac Systems, and thus Daugs, derives from the earnings credits. Daugs does not disclose to his clients the existence of the earnings credits system or his self-dealing. *Id.* 92. Daugs is not aware of any clients who oppose the placement of their funds in an IOLTA account. *Id.*

Maxwell has been an employee of Pacific Northwest Title Company ("PNW Title") since 1985. JA 93. She believes that PNW Title, its vendor of accounting services (which is owned by the same company that owns PNW

Title), and the bank where it maintains trust accounts have an agreement whereby the bank awards earnings credits to pay for accounting services. *Id.* 103-04. Maxwell admitted that she did not know whether fees in Washington for closing escrows would increase if banks did not award earnings credits on trust accounts. *Id.* 114.

Maxwell was an LPO until 1996, when PNW Title requested that she and its other LPOs surrender their licenses. JA 59. PNW Title determined that it could avoid the IOLTA rules by letting its LPOs go. *Id.* 58. It continued not to arrange for payment of interest to clients. *Id.* 110-11. PNW Title informs clients that they need to prepare the necessary documents or have an attorney do so. *Id.* 109-10. Thus, escrow companies can avoid the IOLTA rules, and so can clients, by selecting an escrow company that has done so. If Petitioners' speculation is correct, the escrow companies that avoid the IOLTA rules should have lower fees, but Petitioners offered no evidence to show this.

5. Procedural History

On cross-motions for summary judgment, the District Court granted summary judgment in favor of Respondents and against Petitioners. JA 2-3. The District Court ruled, prior to *Phillips*, that Petitioners had no property interest in the interest paid to LFW or in earnings credits, and did not reach the other issues in the case. Pet. App. 94a, 96a.

After *Phillips*, a three-judge panel of the Ninth Circuit reversed the District Court. Pet. App. 52a. Sitting *en banc*, however, the Ninth Circuit affirmed the District Court on other grounds. The Ninth Circuit concluded that Respondents had not taken Petitioners' property and that, even if they had, the just compensation due was zero.

The Ninth Circuit held that only Brown and Hayes had standing. Pet. App. 19a. Weighing the three factors set forth in *Penn Central Transp. Co. v. City of New York*, 438

U.S. 104 (1978), the *en banc* court concluded that (1) the IOLTA rules had no economic impact on the owners of the principal funds because no interest would have been earned by them on those funds absent the IOLTA rules, and because Brown and Hayes failed to establish as a factual matter that they suffered any economic loss, Pet. App. 33a-38a; (2) Brown and Hayes could not have expected a deposit eligible for IOLTA to achieve a positive net return, and thus the IOLTA rules did not interfere with their investment-backed expectations, *id.* 38a-39a; and (3) the governmental action is properly characterized as a regulation of the uses of Brown's and Hayes' property (constituting the principal and any interest incident thereto, in the aggregate) in the context of the highly regulated fields of banking and law, *id.* 39a-40a.

As an alternative basis for its holding, the Ninth Circuit applied the well-established rule that just compensation is the amount of the owner's loss, not the government's gain, and concluded that Brown and Hayes lost nothing. *Id.* 41a. Their funds were too small or held for too short a period to have earned net interest for them. Even without the IOLTA rules, their funds would have been placed in non-interest-bearing accounts because that was the escrow companies' admitted practice. The *en banc* court further concluded that Brown's and Hayes' "loss" of the "right" to prevent their principal from earning interest had "no economic value." *Id.* 42a.

Four judges, including the three on the original panel, dissented on the taking issue, largely adopting the panel opinion, *id.* 46a, but even they would have remanded on whether there was any compensation due to Brown or Hayes, *id.* 79a.

SUMMARY OF ARGUMENT

The Just Compensation Clause of the Fifth Amendment does not bar every taking of property for public use; it bars taking "without just compensation." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Petitioners not only must establish a taking, but also that they were not provided just compensation for that taking.

Petitioners fail to rebut the presumption that the IOLTA rules are constitutional, instead arguing that *Phillips* "largely disposes of the remaining questions in this case," Pet. Br. at 15, and relying on the unsupported assertion, chanted repeatedly, that the IOLTA rules "burden" a small number of individuals who by "happenstance" choose to use a legal practitioner. *Id.* at 28.

Neither their rhetoric nor their reliance on *Phillips* gets Petitioners anywhere. The IOLTA rules impose no burden on Brown and Hayes, and the question presented in *Phillips* was limited to the "property issue" – whether the interest earned on IOLTA accounts constituted a property interest cognizable under the Fifth Amendment. 524 U.S. at 160. The Court took pains to answer only that question, and "express[ed] no view" on the taking or just compensation questions, *id.* at 172, despite the dissenting Justices' contention that the Court should consider all three questions together, *id.* at 173 (Souter, J., dissenting).[8]

[8] Petitioners incorrectly suggest that Justice Souter "appears to have recognized" that the determination of the property issue effectively answered the taking inquiry. Pet. Br. at 14. Quite to the contrary, Justice Souter (and the three Justices who joined his dissent) concluded that the question answered in *Phillips* "may ultimately turn out to have no significance in resolving the real issue raised in this case, which is whether the [IOLTA] scheme violates the Takings Clause of the Fifth Amendment." 524 U.S. at 172 (Souter, J., dissenting).

Phillips held that any interest earned on client funds is generally the property of the client. 524 U.S. at 172. The Court in *Phillips* did not determine the circumstances in which it might deem clients to have relinquished their right to receive or control the earning of interest. Brown and Hayes indisputably relinquished receipt and control, by using an LPO and acquiescing in the practice of the escrow company trade (both pre-IOLTA and where IOLTA is inapplicable) to place client funds in accounts that pay no interest to the client. Also, *Phillips* acknowledged but did not resolve the important factual question of "[w]hether client funds held in IOLTA accounts could generate *net interest*." *Id.* at 169 (emphasis supplied). On remand in *TEAJF*, the District Court found that the answer was no, 86 F. Supp. 2d at 638-39,[9] and the Ninth Circuit reached the same conclusion here. In neither case did the individual client plaintiffs prove that their funds could have generated net interest in a non-IOLTA account.

The Ninth Circuit correctly decided both of the issues left undecided in *Phillips*. There has been no taking, and the amount of just compensation due is zero because Brown and Hayes suffered no economic loss whatsoever from the IOLTA rules.

IOLTA regulates the handling of client trust funds by legal practitioners. Washington's rules require legal practitioners to deposit client trust funds for the benefit of clients where net interest can be earned for the client. In other circumstances, Washington's rules require the funds to be handled in a way that benefits the legal system as a whole rather than promotes self-dealing by legal

[9] *See* Brief of the Chief Justice and Justices of the Supreme Court of Texas and the Texas Equal Access to Justice Foundation as Amici Curiae in Support of Respondents.

practitioners or permits windfalls to banks. Petitioners acknowledge that the IOLTA rules are a regulation of the trust funds themselves; two of the alleged property rights that they claim are taken by the rules are the rights to prevent interest from being earned on their funds and to have their funds invested in accounts that will yield earnings credits for affiliates of some legal practitioners. Such "rights" (if cognizable at all) are incidents of their property in the principal, not in the interest. The IOLTA rules apply to the whole of the client's affected property: principal and potential interest. Because the IOLTA rules are a regulation of the handling of client trust funds, the proper framework is that set forth in *Penn Central*. Petitioners' claims fail under that standard.

Although Petitioners recognize that there cannot be a *per se* taking where there is no taking under *Penn Central*, Petitioners seek an unprecedented extension of the *per se* rule. Petitioners contend that a temporary taking of one incident of ownership of money (investment, or the right to preclude investment by others) that the owner can avoid, and that in any event causes the owner no economic loss, is a *per se* taking. Petitioners strain to categorize the character of governmental action here as akin to a physical appropriation, despite their having acknowledged in their Questions Presented that IOLTA is a regulatory program that they repeatedly acknowledge has a laudable public goal. Only one strand or incident of Brown's and Hayes' property rights (considered as a whole rather than the interest on the IOLTA accounts in isolation) was affected, not the entire bundle of their property interests. More importantly, it is the one incident that clients had already ceded to their legal practitioners and to the banks in which their funds were deposited. Brown and Hayes were not "singled out" capriciously, but precisely because they were among the many people who have temporarily

provided funds of a small amount, or for a short period, to a legal practitioner for safekeeping.

The state compels neither the pragmatic decisions of clients in these circumstances to relinquish money temporarily to legal practitioners, nor the private arrangements regarding earnings credits incentives. Thus, there is no required acquiescence, and no taking. *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992).

No compensation is due clients who voluntarily relinquish their ability to invest money, either nominal in amount or for a short period, deposited in banks by their legal practitioners. The banks retained the earnings they could make on the funds, or used a portion to encourage LPOs to place such accounts in these banks. Petitioners admit that, both before and after the enactment of Washington's IOLTA rules, escrow and title companies have chosen, without client objection, to deposit their clients' funds in accounts that pay no interest to the clients. With or without IOLTA, Brown and Hayes would not have received a net return on their deposits.

In recognition of the lack of any direct injury-in-fact to Brown and Hayes, they claim to have incurred costs as a result of the alleged inability of the affiliates of their escrow companies to obtain earnings credits. But Petitioners failed to do more than speculate that they incurred any such costs. Even if they had, such indirect costs do not constitute a compensable loss under the Just Compensation Clause.

At bottom, Petitioners are unable to challenge the Ninth Circuit's conclusion that just compensation here is zero. Instead, they leap to the issue of whether equitable relief is available even where there has been no taking without just compensation. There is no authority for awarding injunctive relief to remedy a "taking" for which no compensatory relief is due.

ARGUMENT

I. WASHINGTON'S IOLTA RULES DID NOT TAKE PETITIONERS' MONEY.

A. Under the Traditional Test, the IOLTA Rules Did Not Effect a Taking.

Petitioners are correct on one point – any taking under the *per se* rule must also be unconstitutional under the traditional, multi-factor test summarized in *Penn Central*. *See* Pet. Br. at 16-17, 31. The purpose of the *per se* rule is to shorten the analysis in certain circumstances, not to reach a different result.

Petitioners bear the burden of establishing that Washington's IOLTA rules effected an unconstitutional taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987). This is a fact-intensive inquiry, *see Penn Central*, 438 U.S. at 123-24, on which Petitioners brought forth virtually no facts to meet their burden.

Many regulations result in a distribution of the benefits and burdens of life. They transfer wealth from one group of citizens to another group. In this sense, such regulations result in a direct or indirect appropriation by the government on behalf of the benefited group. In a challenge to a regulation, one of the key factors is the reasonableness of the governmental action. *See United States v. Sperry Corp.*, 493 U.S. 52, 63 (1989); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163 (1980); *Penn Central*, 438 U.S. at 123.

The contention that the IOLTA rules are so unreasonable that they have "no conceivable rational basis" is unpersuasive. Pet. Br. at 29. Petitioners admit that the IOLTA rules serve the "laudable public goal" of access to justice. *Id.* at 22; *see also id.* at 35. The regulations of lawyers' conduct, of which the IOLTA rules are a key part, protect clients from having clients' funds commingled with (or providing any other benefit to) the lawyers' funds, and

by keeping their funds safe and available on demand. Petitioners do not challenge the process by which Washington adopted the IOLTA rules. This case does not involve a challenge by clients of lawyers to the IOLTA rules, and Petitioners have not proved that the clients of LPOs have suffered any economic harm. It is hard to imagine a broader, less burdensome, more fair distribution of the "burdens" among the public than a rule applicable to all who use the legal system and provide small or short-term deposits to a legal practitioner, and a rule that supports legal services for the poor with the net interest that clients were incapable of generating on their own.

Among the compelling indications of the reasonableness of the IOLTA rules are that:

- all 50 states and the District of Columbia have adopted them, *see* Brief of the States of California, Massachusetts, et al., as Amici Curiae Supporting Respondents;
- in the vast majority of states, the state's highest court has used its rulemaking authority to adopt them, *see Phillips*, 524 U.S. at 159 n.1; *see* Brief of the Conference of Chief Justices as Amicus Curiae in Support of Respondents; and
- the national and state lawyers' organizations, whose clients are allegedly affected, support IOLTA. *See* Brief of the American Bar Association as Amicus Curiae in Support of Respondents; Brief for Forty-Nine State Bar Associations and the National Association of IOLTA Programs as Amici Curiae in Support of Respondents.

1. Economic Impact

The IOLTA rules have no negative economic impact on clients whatsoever. To the contrary, Washington's IOLTA rules have a positive economic effect on those clients whose legal practitioners deposit their funds in accounts that earn interest for the client. Pet. App. 33a.

Petitioners argue that they "have never conceded" that "they could have realized little or no value from their funds in the absence of IOLTA." Pet. Br. at 32. More to the point is that they never have contended that any net interest could have been realized on Brown's or Hayes' funds absent the IOLTA rules. Therefore, Petitioners' economic argument falls back on the unique factual circumstances of clients of Washington LPOs and on Petitioners' tenuous assertion that Brown and Hayes suffered an indirect loss of an indirect benefit from private earnings credits arrangements. *Id.* at 32 n.11. Petitioners relegate this argument to a footnote for good reason. The property identified in *Phillips* was interest, not earnings credits. Earnings credits were never the property of Petitioners, as the District Court below found. Pet. App. 96a.

Petitioners' argument regarding earnings credits is an abrupt detour from their Petition, which represented that, "[a]lthough the Texas IOLTA program applies only to trust funds held by attorneys while the Washington IOLTA program applies to real estate escrow funds as well, that distinction is *immaterial to the constitutional analysis*." Pet. at 15 (emphasis supplied). However, the alleged connection between earnings credits and the IOLTA rules is unique to the State of Washington. It should have no effect on the issue of the constitutionality of Washington's IOLTA rules as applied to clients of lawyers, or the constitutionality of other states' IOLTA rules. If earnings credits are the basis for Petitioners' claims, they are hardly worthy of review by the Court.

Worse, Petitioners rely on a misleading description of the record in this case with respect to earnings credits. Putting aside the legality of the scheme they describe, discussed *infra* at notes 13-14 and accompanying text, Petitioners did not present sufficient evidence to survive summary judgment as to the fact or amount of injury to Brown and Hayes from the "loss" of earnings credits. Even

the original Ninth Circuit panel and *en banc* dissent concluded that the amount of any loss to Brown and Hayes from earnings credits was unknown, and "a remand is necessary." Pet. App. 79a.

Petitioners' Statement of the Case asserts as "fact" that earnings credits "directly reduce costs to customers for services," and that the loss of earnings credits means that "bank customers are now paying for many services that formerly were 'free.'" Pet. Br. at 6. This is a bald misstatement of the record. In their argument section, Petitioners only go so far as asserting that there is a genuine issue of material fact concerning the issue of cost reduction from earnings credits "lost" as a result of the IOLTA rules. *Id.* at 36 n.14. But the mere speculation that some benefit from earnings credits trickled down to clients, and then was "lost" after the IOLTA rules, *compare* Pet. App. 112a *with* JA 135-38, would not be sufficient to survive summary judgment.

Earnings credits are provided to a nonsubsidiary affiliate of the escrow company. As the Federal Reserve Board concluded, earnings credits are "not a direct financial benefit to the depositor," i.e., the escrow company, JA 78, let alone a direct benefit to the owner of the funds deposited by the escrow company.

Brown's funds were deposited in a bank that continued to pay earnings credits. Petitioners thus point to Hayes, but there is no evidence that Hayes paid a higher fee as a result of selecting a title company that utilized a bank that no longer granted earnings credits.[10] Hayes

[10] Petitioners rely on the affidavit of the LPO at Fidelity who handled Hayes' real estate purchase. Pet. Br. at 36-37 n.14. It states only that the bank that Fidelity chose to utilize had ceased granting earnings credits to Fidelity. Because this affidavit contains no testimony that Hayes paid any more for Fidelity's services than he would have paid prior to the IOLTA rules, the only reasonable inference is

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admitted that he did not consider fees in deciding which title company to use; his choice was based on location, not pricing. JA 119. So even if Hayes suffered any economic "loss," which he failed to prove, it was not compelled by the state – but by Hayes' choices to select a title company without regard to price and to select one that employed LPOs.

2. Investment-Backed Expectations

Brown and Hayes had no investment-backed expectations regarding the funds at issue. Brown did not suggest otherwise. Hayes admitted that, regardless of IOLTA, he did not expect to earn interest on his deposit. JA 120. In the real world, where the admitted general practice of escrow and title companies is not to place *any* client funds in interest-bearing accounts because of such "inconvenience[s]" as subaccounting, Pet. Br. at 5, clients of LPOs could not have had any investment-backed expectation that their funds would be deposited in an account that earned interest for the client.[11] To the extent that the

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that prices paid by clients such as Hayes did not rise as a result of the IOLTA rules. In any event, like Brown, Hayes could have found an escrow company that still utilized a bank that granted earnings credits. JA 130. Petitioners' general averments and conclusory allegations are insufficient to withstand summary judgment even on the question of constitutional injury-in-fact. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

[11] The bank is free to pool its depositors' funds and invest them as it sees fit for its own gain; the bank's only obligation to the depositor is to repay, on demand, the amount due under the contract with the depositor. *See Bank of Marin v. England*, 385 U.S. 99, 101 (1966); *New York County Nat'l Bank v. Massey*, 192 U.S. 138, 145 (1904). It is "'a fundamental rule of banking law that in the case of a general deposit of money in a bank, the moment the money is deposited it actually becomes the property of the bank, and the bank and the depositor assume the legal relation of debtor and creditor.'" *Allied Sheet Metal*

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LPOs failed to follow Washington's IOLTA rules, as the Ninth Circuit correctly noted, "such a violation cannot be attributed to the State." Pet. App. 34a.

At oral argument in *Phillips*, Petitioners' counsel admitted that clients have no expectation that their legal practitioners will invest their short-term or small deposits that are incapable of earning net interest. Transcript of Oral Argument at 54 (Jan. 13, 1998). Petitioners chose to participate in a system for their benefit – a heavily regulated system involving lawyers, escrow officers, and banks. As the United States pointed out in its *Phillips* brief, "government has historically regulated the capacity of money to earn interest." Brief for the United States as Amicus Curiae Supporting Petitioners at 15. As the United States also noted, it is "the client's decision to set the nominal or short-term funds aside for legal services." *Id.* at 12. Brown and Hayes had no reasonable, investment-backed expectation that their funds would generate any interest.

Nor could Brown and Hayes have had a reasonable investment expectation in the earnings credits system. Not only, as discussed above, have they not shown that they stood to profit from these private arrangements between escrow company affiliates and banks, but the system is illegal.[12] Washington law prohibits escrow companies, whether or not they employ LPOs, from deriving any benefit from the funds that they hold in

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Fabricators, Inc. v. Peoples Nat'l Bank of Wash., 10 Wn. App. 530, 537, 518 P.2d 734 (1974) (quoting 10 Am. Jur. 2d *Banks* § 339 (1963)); *see also Blake v. State Sav. Bank*, 12 Wash. 619, 622-23, 41 P. 909 (1895).

[12] Petitioners erroneously state that LFW raised this issue for the first time in opposition to Petitioners' motion for summary judgment. Pet. Br. at 24 n.8; *but see* Memorandum in Support of LFW's Motion for Summary Judgment at 3-4, 11.

escrow.[13] Wash. Admin. Code § 208-680E-011. The Washington State Bar Association identified the unlawfulness of the earnings credits system as one of the reasons to extend the IOLTA rules to LPOs in the first place. JA 143 (citing Wash. Admin. Code § 308-128E-011, the prior and identical version of Wash. Admin. Code § 208-680E-011).[14]

3. Character of Governmental Action

As the IOLTA rules had no economic impact on, and impaired no investment-backed expectations of, Brown or Hayes, there is no taking under *Penn Central*. Recognizing this failing, Petitioners' Brief at times argues that the character of the governmental action is dispositive. Petitioners repeatedly characterize the IOLTA rules as

[13] State rules of professional conduct uniformly bar lawyers from financially benefiting from their clients' funds. *See* Model Rules of Prof'l Conduct R. 1.15(a) (1999). It follows that lawyers may not accept a financial benefit from banks for placing their client trust accounts in non-interest-bearing accounts instead of IOLTA accounts. *See* Virginia State Bar Legal Ethics Opinion No. 1440 (Nov. 18, 1991).

[14] Petitioners' assertion that "the Washington State Department of Licensing (which regulates escrow companies in the State) has long been aware of, and approves of, the 'earnings credits' system," Pet. Cert. Reply Br. at 7, is incorrect. The alleged "approval" is a nonbinding letter from a governmental agency that has not regulated escrow companies for years, a letter that does not even mention the term "earnings credits," that does not disclose that the escrow company would benefit from earnings credits, and that does not address the legality, under Wash. Admin. Code § 208-680E-011 or § 308-128E-011, of an escrow company deriving a financial benefit from funds held in escrow. *See* Addendum to Petitioners' Ninth Circuit Reply Brief (filed Oct. 13, 1998): Letter from Hugh W. Hawkins, Jr. to Robert Mitchell and Rolund Runion (Oct. 26, 1988); Letter from Runion, Department of Licensing, to Hawkins (Nov. 1, 1988). These letters were not part of the record before the District Court. Since 1995, the Washington Department of Financial Institutions has regulated escrow companies. Wash. Rev. Code § 43.320.011; Wash. Admin. Code § 208-680A-020.

"singling out" "a few individuals" to "bear" the "burden" of funding legal services for the benefit of many. *See, e.g.*, Pet. Br. at 16, 27. At the same time, Petitioners state that the IOLTA rules affect a "huge" number of individuals "on a daily basis." *Id.* at 42. These individuals are "singled out" precisely because they would not obtain an economic benefit from their small or short-term deposits. As the record in this case and in *TEAJF* shows, "no one, including the plaintiffs, is being asked to 'bear' a public burden in any sense that impinges on the notions of fairness and justice." *TEAJF,* 293 F.3d at 247 (Wiener, J., supp. dissenting op. from denial of pet. for rehearing *en banc*).

Petitioners attempt to remove the IOLTA rules from their regulatory context by exclusively focusing on those real estate transactions affected by Washington's IOLTA rules. Washington's IOLTA rules apply to all who are engaged in the practice of law in Washington, including LPOs, and Petitioners ignore that APR 12.1 is but one part of a regulatory program enacted to protect the interests of clients who place their money in the hands of legal practitioners. Petitioners' repeated assertion that the IOLTA rules have "no regulatory purpose," Pet. Br. at 16, 29, is flat wrong.[15] The IOLTA rules help protect clients from legal practitioners who might commingle, or otherwise attempt to benefit from, their clients' funds. The IOLTA rules protect against legal practitioners' self-interest in deciding where to deposit client funds, and simply adjust the benefits and burdens of economic life. Given the highly regulated nature of the banking and legal professions, the rules governing lawyer trust accounts, of which IOLTA is a part, reasonably advance important public purposes. *See* Brief for Respondent Justices of the Washington Supreme Court.

[15] At such times, Petitioners' Brief implies that this case involves a claim under the Due Process Clause. It does not. *See* JA 27-29.

All the parties before the Court, the national legal groups providing briefs as amici curiae in support of Respondents, and even the Ninth Circuit dissenters below agree that the programs funded by IOLTA have a worthy purpose. *See* Brief for AARP, Legal Counsel for the Elderly, Inc., National Legal Aid and Defender Organization, and the Brennan Center for Justice as Amici Curiae in Support of Respondents. In a brief submitted to the Fifth Circuit in *TEAJF*, the WLF wrote that "[we] yield to none in our affirmation of the importance of equal access to justice." Appellants' Response to Petition for Rehearing en Banc at 4 (filed Dec. 11, 2001). For these reasons, the IOLTA rules are distinguishable from those in *Webb's*, where there was no apparent regulatory purpose.

Even ignoring the regulatory purposes, the IOLTA rules – at most – provide for a reasonable assessment on small or short-term deposits provided to a legal practitioner. Unlike in *Webb's*, there is no other fee charged for protecting the client's principal, and it would not be possible for the clients to gain a positive net return from the funds that they provided to their legal practitioner. Petitioners' contention that user fees must be directly proportionate to the cost of government service is not supported by *Webb's* and would invalidate many federal fees, including those for patent and HSR processing. Nothing in the Court's Just Compensation Clause jurisprudence supports, let alone requires, such a result. Moreover, in these circumstances the lack of any economic impact on the client justifies the "assessment."

B. The *Per Se* Takings Approach Is a Rare Exception Inapplicable to IOLTA Regulations.

Because the IOLTA rules are not a taking under *Penn Central*, they cannot be a *per se* taking under Petitioners' own argument. In any event, the IOLTA rules do not fall

within either of the existing *per se* categories, and the Court should not adopt a new *per se* rule to fit the unusual facts of this case.

1. *Per Se* v. Multi-Factor Analysis

The Court carefully restricts *per se* rules due to the risk they present to balanced and practical decision-making. As Justice Holmes stated, a taking "is a question of degree – and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).[16] Only last Term, the Court echoed Justice Holmes when it stated that it was "[r]esisting '[t]he temptation to adopt what amount to *per se* rules in either direction.'" *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).[17] "'The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.'" *Id.* at 1481 n.23 (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)). The "default rule" remains the "more fact specific inquiry" of *Penn Central*. *See id.* at 1484. Only for "relatively rare, easily identified" government conduct is the

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[16] "There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate." *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

[17] Antitrust law presents an analogous instance of the Court's care with respect to *per se* rules. The Court has cautioned against deeming, as a *per se* restraint, conduct it has not repeatedly examined. *See Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 10 (1979). "[E]asy labels do not always supply ready answers." *Id.* at 8. The Court has never examined whether the rules challenged here effect a taking. As Petitioners note, the factual circumstances to which they seek to have the *per se* rule extended are "admittedly unusual." Pet. Br. at 29; *see also id.* at 26.

per se approach appropriate. *Id.* at 1479; *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 1018 (1992) (*per se* takings are "extraordinary" and only occur in "relatively rare situations").

The Court in *Tahoe-Sierra* also repeated *Penn Central*'s admonition that "we must focus on 'the parcel as a whole.'" 122 S. Ct. at 1483 (quoting *Penn Central*, 438 U.S. at 130-31, and citing *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993)). Petitioners attempt to manufacture a *per se* takings claim by focusing solely on one narrow aspect of the property (the interest credited to LFW on the IOLTA accounts in which Brown's and Hayes' principal funds were deposited), while ignoring the effect the IOLTA regulations have on the property (the principal and all its incidents) as a whole. The IOLTA rules dictate how and where the legal practitioner holds the principal funds that clients relinquish to the legal practitioner. The net interest generated in the IOLTA accounts is a byproduct and thus does not stand alone for purposes of Just Compensation Clause analysis. The interest is but one incident of ownership of the whole, rather than a separable property interest, even more so than the coal in the ground in *Keystone Bituminous Coal*.

a. The First *Per Se* Category Is Inapplicable to IOLTA.

The IOLTA rules do not meet any of the three elements of the first *per se* category: a (1) permanent (2) physical invasion of (3) tangible property. First, the alleged taking is not permanent; it is only during the brief time periods (two days for Brown, two and 16 days for Hayes) in which a client relinquishes control of his funds to his legal practitioner. Second, it does not make sense to speak of money being physically occupied or invaded. *See Andrus*, 444 U.S. at 65-66 (distinguishing between loss of

future profits and physical invasion). Third, the incident of property at issue here – interest, or the right not to earn interest – is intangible.

"Not every physical *invasion* is a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982). For example, a temporary physical invasion is not a *per se* taking, and is not necessarily an unconstitutional taking at all, particularly where the owner has made no effort to "exclud[e] *all* persons from his property." *Id.* at 434 (emphasis supplied) (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980)). In *Loretto*, the Court specifically distinguished between permanent physical occupations and regulations involving "deprivation of the right to use and obtain a profit from property," where the government has "broad power" to regulate. *Id.* at 436, 441. In this case, Brown and Hayes voluntarily relinquished control and use of their funds during the brief period of deposit.

The Court has limited the first *per se* category to physical invasions of real property, and has never applied it to a temporary taking of intangible personal property. *Lucas* cites *Loretto* as an example of the first *per se* category. 505 U.S. at 1015. *Loretto* involved a challenge to a law that permitted cable television companies to physically invade real property to install cable wires. The Court specifically noted that "permanent physical occupation of real property" was what constituted a *per se* taking, and remanded the case to the state courts for a determination of the amount of just compensation, if any, due.[18] 458 U.S.

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[18] It is far from "clear" that "a *per se* taking by permanent physical occupation may occur through actions that actually enhance the overall value of the property in issue." *See* Pet. Br. at 34 n.13. In support of their contention, Petitioners rely on a point by the dissent in *Loretto*, which the majority criticized as "speculative and . . . contradicted" by the record. 458 U.S. at 437 n.15.

at 427, 441. In addition, a physical taking occurs "only where [the government] *requires* the landowner to submit to the physical occupation of his land." *Yee*, 503 U.S. at 527. There is no similar compelled submission in this case.

b. The Second *Per Se* Category Is Inapplicable to IOLTA.

The second *per se* category is equally inapplicable, as it applies only to real property. *Lucas*, 505 U.S. at 1015 (concluding categorical treatment is appropriate "where regulation denies all economically beneficial or productive use of land"). The law has long treated real property differently from personal property. *See id.* at 1027-28. In *Lucas*, the Court expressly distinguished personal property from land because of "the State's traditionally high degree of control over commercial dealings, [which] ought to [make the property owner] aware of the possibility that new regulation might even render his property economically worthless." *Id.* As Petitioners admit, Pet. Br. at 27, the Just Compensation Clause continuum offers less protection to personal property than land, and less to money than to other forms of property. *See Phillips*, 524 U.S. at 168 ("'[A]nticipated gains ha[ve] traditionally been viewed as less compelling than other property-related interests.'") (quoting *Andrus*, 444 U.S. at 66).

2. The Fungible Nature of Money Makes Application of *Per Se* Analysis Particularly Inappropriate.

Unlike real or personal property, money does not require the assistance of the Just Compensation Clause to make it interchangeable with its fair market value. It is impersonal and has no intrinsic value, only the value conferred by the government as a means of legal tender. On the basis of money's fungibility, the Court has explicitly rejected the argument that the appropriation of money

constitutes a physical taking. *Sperry*, 493 U.S. at 62 n.9. The Court need not decide here whether the *per se* rule would apply if the government simply confiscated pre-existing monetary assets, or appropriated income that monetary assets would have generated for the owner apart from a regulatory program. The key insight of *Sperry* is that money is fungible, and a regulation of the use of money by regulated persons cannot result in a taking if there is no net economic loss.

The Court has repeatedly recognized the distinction between regulations of real property and regulations imposing direct or indirect monetary assessments or fees. For example, in a challenge to the Coal Act's imposition of monetary liability on an employer for an employee benefits fund, a plurality of the Court stated that this "is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a *per se* taking." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 530 (1998) (citing *Loretto*, 458 U.S. at 441). The Court made the same distinction in a case involving the exaction of a percentage of any award made by the Iran Claims Commission. *Sperry*, 493 U.S. at 62 n.9 ("It is artificial to view deductions [from] a monetary award as physical appropriations of property" because "[u]nlike real or personal property, money is fungible.").

Petitioners suggest, by a "*cf.*" citation, that *Sperry* is limited to cases involving a fee imposed for services. Pet. Br. at 28. But that was not the rationale used in *Sperry*, and *Phillips* imposes no such limitation. *Sperry* does not support Petitioners' assertion that only fees-for-services regulations, taxes, and forfeitures fall outside of the *per se* rule. The Court has refused, in at least four cases not involving government fees, to apply *per se* analysis to government assessments of money. *See Eastern Enterprises*, 524 U.S. at 529-30 (plurality holding that Coal Act's retroactivity effected a taking under *Penn Central* framework); *Concrete Pipe*, 508 U.S. at 643-44 (Multiemployer

Pension Plan Amendments Act's imposition of withdrawal liability on employers did not effect a taking under *Penn Central*); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) (same); *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987) (changes to standard for eligibility for Federal Aid to Families with Dependent Children did not effect a taking under *Penn Central*).

Nor in *Webb's* did the Court apply the *per se* rule. *Webb's* was decided two years before the Court's outlining of the *per se* rule in *Loretto* for permanent physical invasions of real property. The Court in *Webb's* repeatedly cited *Penn Central* and analyzed the question, "What would justify the county's retention of that interest?" 449 U.S. at 162. That inquiry into public purpose and the property owner's expectations, *id.* at 161, is irrelevant in a *per se* analysis. As to the facts of *Webb's*, it was undisputed that the $1.8 million in principal could earn a net return and that its owners "had more than a unilateral expectation" of receiving a net return on the funds. *Id.* at 161. The statute at issue there required that all interpleader money be deposited in an interest-bearing account, *id.* at 156 n.1, whereas the IOLTA rule at issue here states that the only money that should be placed in an IOLTA account is money that could not otherwise earn interest on its own. And even that money is voluntarily given by the client to the legal practitioner, with no compulsion by the state.

The Court's holding that rent control statutes "are not *per se* takings" also undermines use of the *per se* rule here. *Federal Communications Comm'n v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). Rent controls regulate money, and arguably "take" money from landlords by prohibiting them from controlling their investment by raising their rents to market levels. Nonetheless, "States have broad power" to enact such regulation. *Loretto*, 458 U.S. at 440; *see also Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988) (declining to reconsider the constitutionality of rent control as a *per se* taking).

Petitioners ask to establish a third *per se* category for temporary denial of control over investment of money, even where the owner of the money would not have invested it, let alone earned any money from that "investment." Other than the Fifth Circuit's decision in *TEAJF* (which half of the acting Fifth Circuit judges voted to rehear), *see* 293 F.3d at 243, no court has recognized such a third *per se* category, or even found a taking from the IOLTA rules at all. The newest basis for Petitioners' argument for a dramatic expansion of the *per se* rule is that the IOLTA rules "burden" a "haphazardly selected" and small number of individuals. Pet. Br. at 23. Petitioners sprinkle similar slogans, with no real analysis, throughout their brief. *See, e.g., id.* at 15-16, 17, 22-23. This is not the test for whether to adopt the *per se* rule.

In any event, there is no "burden" imposed by the IOLTA rules, as Brown and Hayes could not have obtained a positive net return on their short-term deposits. For that very reason, the IOLTA rules are not "haphazard" in whom they "happen to" affect. These regulations supplement long-standing rules governing the handling of clients' funds, protect trust accounts of vast numbers of clients of legal practitioners across the country, and utilize changes in banking law to benefit legal services. Petitioners assert that individuals like Brown and Hayes have "no particular connection to the provision of legal services," Pet. Br. at 16, but that is the very service they are getting from LPOs in the State of Washington.[19]

[19] Perhaps Petitioners believe that LPOs' services are not legal services, but that issue of state law was decided by the Washington Supreme Court prior to Washington's adoption of an IOLTA rule for lawyers or LPOs, *Kassler Escrow*, 96 Wn.2d 443, and is not in dispute.

The Court has never before found a taking unconstitutional where the claimant failed to prove that he suffered any economic loss (and thus no compensation was due). It would be a dramatic expansion of the Court's takings doctrine to classify this type of taking as falling under the *per se* rule. If *per se* analysis is applied to government regulation of money here, a variety of other government acts are likely to be *per se* takings, including regulations of interest rates, banking, minimum wages, and rules requiring taxpayers to pre-pay income tax via withholding. In this difficult area, a new *per se* exception would soon be swallowed by exceptions to the exception.

3. Petitioners Were Not Required to Acquiesce.

"[R]equired acquiescence is at the heart of the concept of occupation" and thus is critical to application of the *per se* rule under *Loretto*. *Florida Power*, 480 U.S. at 252; *see Yee*, 503 U.S. at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land."). Petitioners' argument that a *per se* taking occurred rests on the conduct of private parties. As the Ninth Circuit correctly concluded, Brown and Hayes "gave dominion and control to their respective title and escrow companies." Pet. App. 44a. They relinquished the decision where to deposit their funds and under what terms.

If legal practitioners violate the IOLTA rules by depositing in an IOLTA account client funds that are capable of earning a net return for the client, any resulting "taking" is not caused by the rules but by the conduct of private parties. A "fundamental fact of our political order" is that the Constitution applies to state action, not acts of private parties. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

This is particularly true as to earnings credits. Earnings credits are a private arrangement between banks and escrow company affiliates. Such credits provide escrow companies with an incentive to deposit their clients' funds in non-interest-bearing accounts at the bank offering the most earnings credits. The decision of a bank to cease offering the earnings credits incentive to its customers cannot be attributed to the state, and thus cannot give rise to a takings claim. *See American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (holding that "a *private insurer's* decision" to withhold medical benefits under state workers' compensation statute was not state action). Like the private insurers in *Sullivan*, who were free to withhold medical benefits with or without the state's approval, a private bank is free to reduce the earnings credits incentive with or without the state's approval.

Before the IOLTA rules were in effect, LPOs allowed the banks to keep any earnings from their clients' funds, or arranged to share the benefits with banks indirectly. The state action here regulates those engaged in the practice of law in Washington, not clients. Indeed, the state is attempting to protect clients from legal practitioners' self-interest in selecting a bank and terms of deposit. Thus, if the IOLTA rules "take" anything, it is from the banks that previously kept any net interest earned from their pooling of these small or short-term deposits.

II. NO COMPENSATION IS DUE BROWN AND HAYES BECAUSE THEY DID NOT SUFFER ANY ECONOMIC LOSS.

Washington's IOLTA rules do not violate the Just Compensation Clause because, even if a "taking" of property occurred, neither Brown nor Hayes suffered any economic harm whatsoever. As the *en banc* Ninth Circuit correctly concluded, this is an independent basis for

rejecting Petitioners' claims. Because the analysis here is so straightforward, the Court may wish to consider only the just compensation question and affirm on that basis.

Petitioners did not seek summary judgment as to what just compensation they are owed, but simply sought a ruling that a "taking" had occurred for which Petitioners claimed entitlement to compensatory and injunctive relief. They did not create a genuine issue of fact as to whether they suffered any economic injury in fact or whether any amount of compensation is actually due. Petitioners' Brief uses the word "money" 36 times without once mentioning the amount of money that Brown and Hayes allegedly "lost." Their argument is purely abstract. In "the real world," Pet. Br. at 33, this is a case about two clients who have lost nothing.

The Court often refers to the "Just Compensation Clause" of the Fifth Amendment, highlighting that a taking is not unconstitutional unless the state fails to pay just compensation. *See, e.g., Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997); *Williamson County*, 473 U.S. at 195; *United States v. 564.54 Acres of Land*, 441 U.S. 506, 608 (1979). This is not merely a matter of academic interest. The Just Compensation Clause does not prevent the government from acting; it merely requires the government to pay for the consequences of acting, when the action rises to the level of a taking without just compensation.

All eleven judges on the *en banc* panel agreed that if Brown and Hayes suffered no loss as a result of Washington's IOLTA rules, no just compensation is due. Pet. App. 41a-45a (majority op.), 79a-84a (dissenting op.). Even the Fifth Circuit acknowledged that "a 'taking' is distinct from 'just compensation,'" *TEAJF*, 270 F.3d at 189, a legal distinction that Petitioners agree is "[o]bvious[ ]," Pet. Br. at 34 n.13. In some cases, as here, the amount of just compensation is zero, and that, under the plain language of the Fifth Amendment, is the end of the inquiry. *See*

Brief of the National League of Cities, International Municipal Lawyers Association, and Trial Lawyers for Public Justice as Amici Curiae in Support of Respondents.

The burden is on Petitioners to prove that they suffered a specific and uncompensated loss from the IOLTA rules, which they have not attempted to do. Instead, they outline three arguments (in two pages) that fail to survive scrutiny: (1) just compensation is "exactly equal" to the amount of interest "taken," Pet. Br. at 36; (2) just compensation is the "less clearly determinate value" of the "loss" of the "right" to prevent others from earning interest on their short-term deposits, *id.* at 37; and (3) just compensation is a disputed issue of material fact on the "value of the earnings credits that would have been applied to their real estate transactions absent the IOLTA program," *id.* at 36 n.14.

A. The Clients Lost No Interest.

Not even the Ninth Circuit dissenters accepted Petitioners' first argument. *See* Pet. App. 83a ("just compensation for interest taken by IOLTA after IOLTA causes the interest fund to exist is something less than the amount of the interest"). Brown and Hayes submitted no evidence that their legal practitioners could have placed their short-term deposits in a bank account that would have earned any net interest for Brown and Hayes. *A fortiori*, they could not have earned the "exact amount" (an amount not in the record) of net interest paid to LFW after deduction of fees charged to LFW. This amount, if positive, resulted from the pooling of Brown's and Hayes' funds with those of numerous other clients in a way that avoided certain bank and legal practitioner fees and the cost of preparing IRS reports. Brown admitted in his deposition that "without IOLTA in place I may not have earned anything." JA 130.

For IOLTA-eligible accounts, the banking, tax-reporting, and legal practitioners' costs in opening a new

or separate subaccount would have exceeded any interest paid to LFW. As the District Court's factual findings in the *TEAJF* trial demonstrate, these costs "exceed the costs of IOLTA" and "make net interest to clients infeasible except in cases where large sums of money are held or when client funds are held for long periods of time." *TEAJF*, 86 F. Supp. 2d at 641-42.

In determining the amount of just compensation due, "the question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). Petitioners offer no precedent to support their argument that this rule has no relevance where the property allegedly taken is money. To use Petitioners' words, it is "readily ascertainable" what Brown and Hayes lost. Pet. Br. at 17. They lost zero. *See* Pet. App. 38a. In these circumstances, "there would be no justice in paying for a loss suffered by no one in fact." *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913).

After all, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194. The purpose of the Just Compensation Clause is to place the property owner in the same position as if no taking had occurred. *564.54 Acres of Land*, 441 U.S. at 509. Brown and Hayes are not seeking to put themselves in the same position. They seek a windfall – to recover interest that would be unavailable but for the IOLTA rules.

The ability to earn interest on bank deposits was regulated well before the IOLTA rules came into existence. As the Court recognized in *Phillips*, the "Federal Government, through the structuring of its banking and taxation regulations, imposes costs on [the interest] if private citizens attempt to exercise control over it." 524 U.S. at 171. The Just Compensation Clause calculus considers the costs imposed by these unchallenged, pre-IOLTA banking and tax regulations because just compensation is "the fair

market value of the property on the date it is appropriated. . . . [It is] what a willing buyer would pay in cash to a willing seller." *Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 & n.15 (1984) (internal quotation marks and citation omitted) (noting that the Court tolerates the "occasional inequity" resulting from the fair market value standard).[20] As both the Fifth and Ninth Circuits agree, what a willing buyer would pay in cash to a willing seller necessarily takes into account valid, pre-existing governmental regulations. *See United States v. 62.50 Acres of Land*, 953 F.2d 886, 890-92 (5th Cir. 1992) (federal, state, and local environmental regulations properly considered in determining market value of property) (citing *United States v. 174.12 Acres of Land*, 671 F.2d 313, 316 (9th Cir. 1982)). Here, if an individual client chose not to relinquish control over his small, short-term deposit, but instead had invested it in an interest-bearing account, he would then have had to incur transaction costs (bank fees and accounting costs associated with completing a 1099 federal income tax form) greater than any interest generated. Petitioners offered no evidence to the contrary.

B. The Lost Opportunity to Prevent Funds From Earning Interest Temporarily Is Not an Economic Loss for Which Just Compensation Is Due.

Petitioners' second argument on just compensation – that the amount due is the "loss" of the opportunity to control whether their principal earns interest for anyone –

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[20] Similarly, government is not required to compensate a property owner for value that government added to the property. *City of New York v. Sage*, 239 U.S. 57, 61 (1915); *see also United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 629 (1961); *United States ex rel. Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 275-76 (1943).

also fails. In the first place, this is exactly the opportunity that Brown and Hayes voluntarily gave up by utilizing an escrow company with LPOs, by allowing the escrow company and bank to decide whether the principal is invested while on deposit, and by allowing LPOs like Daugs to put non-IOLTA deposits in accounts whose interest, at best, benefited only the LPO, not the client. As Petitioners admit, this "loss" has "no readily determinable fair market value." Pet. Br. at 37. Without citing to any case, and ignoring the statement in *Phillips* that the intangible "right" to exclude "may have no economically realizable value to its owner," 524 U.S. at 170, Petitioners baldly assert that such a "loss" "clearly ha[s] *some* value," Pet. Br. at 37. It has no economic value. Under *PruneYard*, even when "there has literally been a 'taking' of" the "right to exclude others," there is no "'taking' in the constitutional sense" if the value of the property is not unreasonably impaired. 447 U.S. at 82 (internal quotation marks and citation omitted).

The question is whether Brown and Hayes proved that they suffered any economic loss; if not, under the Court's decisions, they are not entitled to nominal damages because their sole textual remedy is "just compensation." *See Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280, 282 (1926) ("For, even if there was technically a taking, the judgment for [the government] was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the government to pecuniary loss."); *United States v. Cress*, 243 U.S. 316, 328 (1917) (an unconstitutional taking requires proof of "substantial" damage). *See also Perry v. United States*, 294 U.S. 330, 355 (1935) (no claim against federal government for nominal damages). Brown and Hayes did not proffer any evidence in the lower courts as to the value of their alleged loss of the right to control.

Similarly, the Court has rejected arguments that just compensation includes an amount for the sentimental or subjective "value" of property. *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("[L]oss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.") (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-09 (1923)); *see also United States v. 50 Acres of Land*, 469 U.S. 24, 35 (1984) (just compensation is fair market value, not "subjective values which are only of significance to an individual owner"); *United States v. Miller*, 317 U.S. 369, 375 (1943) (just compensation does not include "special value" to the owner).

At most, the IOLTA rules prevented the LPOs to whom Brown and Hayes freely gave their deposits from putting that money in a non-IOLTA, non-interest-bearing account, where the interest value would go to the bank or LPO, not to the clients. The Ninth Circuit correctly concluded that this is a "loss" of no economic value and therefore "not compensable under the Fifth Amendment." Pet. App. 45a (internal quotation marks and citation omitted). A voluntary loss of temporary dominion over the deposits to ensure that no interest would be earned by someone else is, at best, merely "subjective value" the Court previously has found to be noncompensable.

C. The Effect on Earnings Credits, a Red Herring Unique to Washington LPOs, Did Not Result in Any Direct Loss for Which Just Compensation Is Due.

In addition to their alternative arguments that just compensation is either easy or hard to quantify, Petitioners claim in a footnote that they are at least entitled to a trial on the amount of just compensation. They contend

"that the Ninth Circuit failed to credit Petitioners' evidence regarding lost earnings credits." Pet. Br. at 36-37 n.14 (citing JA 51-52).

As discussed above in section I.A.1, Petitioners misstate the summary judgment record with respect to earnings credits. The record simply does not support Petitioners' assertion that Brown and Hayes lost anything as a result of any impact of IOLTA on the availability of earnings credits to escrow affiliates. Moreover, as discussed in section I.A.2, the system of earnings credits is illegal. Even if earnings credits were legal, and if there were a genuine issue of fact as to whether the decision of a bank to stop paying these credits to escrow company affiliates resulted in an indirect cost increase to Hayes, the Constitution does not require that states compensate property owners for such an indirect loss. *United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979) ("[I]ndirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled."); *see United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945) (concluding that the property owner "must stand whatever indirect or remote injuries" are caused by the taking); *Mitchell v. United States*, 267 U.S. 341, 345 (1925) (denying compensation for the destruction of a property owner's business as "an unintended incident of the taking of land").

The just compensation here is zero, and thus there was no loss for which "just compensation" is due.

III. INJUNCTIVE RELIEF IS UNAVAILABLE AND INAPPROPRIATE.

Petitioners are trying to use injunctive relief to evade their burden of proving the fact and amount of damage. The Just Compensation Clause guarantees just compensation; as even the Ninth Circuit dissent found, the Clause does not generally allow for "prevention of the taking."

Pet. App. 79a (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)). Indeed, where the claimant's only interest is financial, traditional equitable principles should never justify equitable relief rather than damages. *Cf. Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) ("Money damages are, of course, the classic form of *legal* relief.").

Petitioners argued in their Petition that injunctive relief should be the rule where a Just Compensation Clause plaintiff cannot prove any economic loss. Pet. at 29. They now take a narrower approach, seeking only a remand to the District Court to exercise its discretion, *see* Pet. Br. at 46 n.22, apparently guided largely by whether it would be futile for Brown and Hayes to seek a remedy in state court. Before turning to the question of injunctive relief, however, it is important to address Petitioners' standing to seek injunctive relief and whether the Court should reach the injunctive issue at all.

A. The Non-Client Petitioners Lack Standing.

The Petition presents no question as to the Ninth Circuit's ruling that the Non-Client Petitioners lack standing, and that issue is not subsumed within the Questions Presented. The Non-Client Petitioners are separate parties. The court below decided their claims on a separate ground. It is not necessary for the Court to reach that basis to decide, as to Brown and Hayes, the Questions Presented.[21] Indeed, the first question that Petitioners present expressly refers to the entitlement to relief of "property owners," and the second expressly refers to the

[21] Because Brown and Hayes had no property interest in the earnings credits themselves, they lack standing to claim a loss of any benefit from earnings credits. *See supra* note 10; *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

"owners of the interest taken." Petitioners' Brief refers 25 times to the rights of "property owners." While the LPO Petitioners in fact act as if they own the right to benefit from their clients' money, they do not assert that they are "property owners" or "owners of the interest taken."[22]

Moreover, the Non-Client Petitioners make no effort to explain why the Court should grant them third-party standing. In light of the presumption against such standing, *Singleton v. Wulff*, 428 U.S. 106, 113 (1976), that silence dooms their argument. The Court should not allow them to make their initial argument in their reply brief. In any event, the silence merely reflects the fact that there is no reason for third-party standing here. The property owners have standing, are able to press their own rights, and are doing so. *See Powers v. Ohio*, 499 U.S. 400, 411 (1991).

B. The Court Need Not Address the Injunctive Relief Question.

The District Court and the Ninth Circuit did not reach the issue of the appropriate remedy because they found no constitutional violation, and Petitioners did not make the showing necessary for the issuance of an injunction. Even the original three-judge panel (adopted by the *en banc* dissent) would have remanded to the District Court for that court to determine a remedy. Pet. App. 79a. Petitioners now seek no more than such a remand, which would

[22] The LPO Petitioners might argue in their reply that they have "legal title" to their clients' funds. *See* Pet. Cert. Reply Br. at 8. Nonetheless, Petitioners have never made any claim that such legal title was taken, or that it included the right to receive or benefit from any interest a bank might agree to pay. At most, the assertion of legal title reconfirms that clients surrendered to their legal practitioners the clients' right to control the investment of their principal.

include a trial based on earnings credits. Pet. Br. at 36-37 n.14. The Court should not speculate about whether the District Court would be within its discretion in entering some unspecified form of injunctive relief on whatever unknown showing Petitioners might make if remand were even appropriate. Such unnecessary speculation is risky and ill-advised in these circumstances.

As discussed below, Petitioners admit that *Eastern Enterprises* was a plurality decision proposing a new rule for federal court adjudication of Just Compensation Clause claims against federal defendants. This case does not require a determination whether such a rule should apply in cases against state defendants. The parties did not even present the District Court with a record as to the appropriateness of injunctive relief, and certainly did not do so with the guidance of *Eastern Enterprises*, which was decided while this case was on appeal. The Court should not address the injunctive relief question; instead, if it decides to reverse on liability, the Court should instruct the lower court to consider *Eastern Enterprises* in determining an appropriate remedy, if any.

C. If the Court Reaches the Issue, It Should Find That Injunctive Relief Is Unavailable.

Petitioners do not dispute that injunctive relief is an extraordinary remedy in general, and particularly in Just Compensation Clause cases. They grudgingly admit that there is no constitutional violation unless the government has refused to pay just compensation. Pet. Br. at 18, 34 n.13. "The very fact of their inability to prove a compensable monetary loss should end the case, not trigger a search for alternative equitable remedies." *TEAJF*, 293 F.3d at 254 (Wiener, J., supp. dissenting op. from denial of pet. for rehearing *en banc*). Petitioners rely on *Eastern Enterprises*, which they summarize as authorizing, for the

first time,[23] injunctive relief against "direct transfer[s]" by the federal government from "property owners," on the theory that it would be pointlessly circular for a federal court to require the United States to repay the same sum that was exacted. Pet. Br. at 40; *see* 524 U.S. at 521-22.

Justice Kennedy rejected the plurality's Just Compensation Clause analysis, and the four dissenters found the Just Compensation Clause inapplicable. But even on its face, the plurality rationale with regard to alleged pointless compensation for "direct transfers" ordered by the federal government does not apply here. This is not a direct transfer. The federal courts here are dealing with state governmental action, not federal. Brown and Hayes have not shown that they suffered even any indirect "loss" due to changes in earnings credits practices.

It would not be pointless to determine how much, if any, financial injury Brown or Hayes suffered. Petitioners admit that Respondents might not owe all that was paid by the banks to LFW but only "some or all." Pet. Br. at 42. Petitioners have come forward with no logical argument to recover all the interest without deducting the fees and costs that would have been imposed absent IOLTA. If Respondents do not owe "all," it is not pointless to require Petitioners to meet their burden of proving the precise amounts, if any, that are due.

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[23] Contrary to Petitioners' suggestion, the Court in *Webb's* did not order or authorize injunctive relief. In that case, which was appealed from the Florida Supreme Court, the Court found unconstitutional a seizure of accrued interest in the absence of any argument that the financial impact on the principal owner was less than the interest, or that there was a state law damages remedy. *See* 449 U.S. at 158, 161.

Moreover, the plurality analysis in *Eastern Enterprises* addressed what it viewed as a complete absence of a damages remedy, and did not justify injunctive relief as a method of dealing with the numerosity of claimants or the small size of individual claims.[24] The Court surely has no more authority in these circumstances than does Congress to abrogate states' sovereign immunity where state remedies are "less convenient than federal remedies" but not therefore "constitutionally inadequate." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 644 (1999); *cf. Hudson v. Palmer*, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring) ("When adequate remedies are provided and followed, no uncompensated taking . . . can result."). The most the federal court should order is that the state create a more efficient claims process.

In addition to practical considerations, Petitioners argue that the Ninth Circuit has irrefutably established that Washington courts will not treat them fairly in seeking remedies for future seizures. This is incorrect. In the first place, the Ninth Circuit held only that Brown's and Hayes' damages claims were ripe for federal court resolution because most members of the highest Washington court were parties to this action and had defended the merits of the IOLTA program. Respondents are free to challenge that holding, because success in doing so would not change the result below – dismissal of Petitioners' Just Compensation Clause claims.[25]

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[24] The only court to reach the injunctive relief question is the Fifth Circuit in *TEAJF*, and it relied heavily on its erroneous conclusion that the defendants had conceded that injunctive relief could be awarded. *Compare* 270 F.3d at 190 *with id.* at 196 (Wiener, J., dissenting). Respondents made no such concession.

[25] Before the Ninth Circuit, Respondent LFW questioned whether Petitioners' claims were ripe for federal court review under *Williamson*

(Continued on following page)

Beyond that, however, the Ninth Circuit did not even rule as to those future claims to be addressed should the Court find that there is liability in this case. Injunctive relief is a remedy only as to future takings without just compensation. As to those, as Petitioners note, "[s]tates and their officers are expected to conform their conduct to the dictates of the Constitution." Pet. Br. at 47. Even if Petitioners are correct that their current claims are ripe in federal court, Petitioners have not attempted to explain why state remedies would be inadequate as to future claims after this case has been decided. There is no reason to assume that Washington judges in future cases will not follow the law as announced by the Court in this case. The Court assumes such fidelity every time it reverses and

County, 473 U.S. at 186. The Ninth Circuit concluded that it would be futile for Petitioners to pursue their current claims in state court and thus that Petitioners could seek relief in federal court. Pet. App. 21a (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999)). The Ninth Circuit relied on the Washington Supreme Court Justices' assertion in this federal case that no Fifth Amendment violation has occurred. *Id.* But the Justices who are parties to this action might not be the final authority on Petitioners' claims. Appeals from the Washington Court of Appeals to the Washington Supreme Court are discretionary. Wash. R. App. P. 13.3. Moreover, the Justices might recuse themselves in such a challenge. *See Schmier v. United States Court of Appeals*, 279 F.3d 817 (9th Cir. 2002) (in case challenging constitutionality of Ninth Circuit rule, all judges of the Ninth Circuit recused themselves, and judges sitting by designation decided case). None of the Washington Supreme Court Justice Respondents was a member of the court that adopted the IOLTA rule in 1984. The Justices who adopted the rule determined it was constitutional on the basis that the clients had no property interest in the interest earned on principal funds deposited in IOLTA accounts, which leaves Petitioners free to argue that there has been an intervening change in the law and that the IOLTA rules must be reevaluated by the present Justices. And, of course, the Court could review any decision of the highest state court on issues of federal law.

remands a decision of a highest state court. *See Bush v. Gore*, 531 U.S. 98, 115 n.1 (2000) (Rehnquist, J., concurring) (describing the Court's function in Just Compensation Clause cases as performing an "independent evaluation" of state law to which the state courts must ultimately adhere).

Petitioners assert that the plurality rationale in *Eastern Enterprises* is equally applicable to "claims filed against a State or local government." Pet. Br. at 42. Federal courts do not always treat state and local governments the same as the federal government. Petitioners fail to address any of the principles of special deference to state governments except the Eleventh Amendment, which they mention in passing and then ironically only for the proposition that it might prevent payment of damages in actions against a state in federal court. Pet. Br. at 47 n.23. However, a federal court should not be empowered to enjoin a state merely because the Eleventh Amendment prohibits the federal court from awarding monetary relief. *See Alden v. Maine*, 527 U.S. 706, 748 (1999).

Federal injunctive relief is both less justified under the plain language of the Constitution and more intrusive of state interests, because it halts or limits a state program, in this case a well-considered and laudable one. *Cf. id.* ("the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine," if the states at the time had not retained constitutional sovereign immunity in their own courts).[26] A rule allowing

[26] Washington courts hear cases raising federal constitutional challenges to state action. *State ex rel. Robinson v. Superior Court*, 182

(Continued on following page)

federal courts to second-guess the practicalities of state monetary remedies would cause pointless federal litigation and threaten state decisions that a public policy is so important that the state is willing to pay just compensation. The federal courts' equitable power is not boundless. As the Court stated in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999), "[w]e do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief. To accord a type of relief that has never been available before–and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent–is to invoke a 'default rule,' not of flexibility but of omnipotence." (Citation omitted.)

Finally, Petitioners refer to their core objection as being that the IOLTA rules operate similarly to a tax. Pet. Br. at 27 n.9. Federal courts have long been reluctant to interfere with state taxes, applying rational basis review. *See Stebbins v. Riley*, 268 U.S. 137, 140-41 (1925) (citing *Dane v. Jackson*, 256 U.S. 589, 599 (1921)) (rejecting takings challenge to state regulatory taxing provision). As outlined above in section I.A.1, the rational basis test is satisfied here. And Congress has prohibited federal courts from enjoining state tax laws. 28 U.S.C. § 1341.

On this summary judgment record, there is no basis for granting injunctive relief.

Wash. 277, 281-84, 46 P.2d 1046 (1935) (*cited in Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 317 n.15 (1997) (Souter, J., dissenting)).

D. If Injunctive Relief Is Available at All, Petitioners Must Make an Extraordinary Showing on Remand.

If the Court finds a taking, just compensation due, and that injunctive relief is an option in this case, the Court should instruct the District Court to grant injunctive relief on remand only if Petitioners make an extraordinary showing.

In addition to examining the adequacy of the legal remedy, the lower court must balance the public interest against the private hardship. *See Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("[T]he doctrine of equitable discretion . . . permits a court to refuse relief . . . when that would unduly impair the public interest. . . . [I]t is simply untenable that there must be a judicial remedy for every constitutional violation."). That balance is not close. Even Petitioners repeatedly laud the public interest here. In every state, either the highest court or the legislature has adopted IOLTA rules. There is no private interest beyond avoiding an allegedly inconvenient action in state court. The fact that almost all clients will continue not to care that they are not receiving any net return on their IOLTA-eligible funds is a reason to preserve the public benefits of IOLTA, not to end them.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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October 18, 2002

(18)
Supreme Court U.S.
FILED
OCT 18 2001
OFFICE OF THE CLERK

NO. 01-1325

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, AND L. DIAN MAXWELL,

Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE LEGAL FOUNDATION OF WASHINGTON; AND GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, AND CHARLES Z. SMITH, IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE SUPREME COURT OF WASHINGTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Supreme Court of Washington regulates the practice of law, including handling of client funds by the legal professionals that it licenses. The regulation challenged in this case, Washington's IOLTA (Interest On Lawyer Trust Accounts) rule helps ensure that client funds (1) earn net interest for the client whenever they are capable of doing so; (2) are not used for the benefit of the licensed legal professional when they are incapable of earning net interest for the client; and (3) in the latter circumstance, are placed in an interest-bearing account authorized by federal law. Interest on these IOLTA accounts funds public legal services, including legal services for the indigent. Admission to Practice Rule 12(h), 12.1.

1. Does Washington's rule effect a taking of interest on IOLTA accounts under the Fifth Amendment?

2. If Washington's IOLTA rule effects a taking, are Petitioners entitled to anything by way of "just compensation" when they could not realize net interest on their funds in the absence of the challenged rule?

3. When Washington provides an adequate state remedy to secure just compensation, may its IOLTA rule be enjoined?

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STATEMENT OF THE CASE

The Washington Supreme Court regulates the practice of law, including the handling of client trust funds, to ensure ethical conduct by attorneys and other licensed legal professionals. The regulation challenged in this case, Washington's Interest On Lawyer Trust Accounts (IOLTA) rule, discourages licensed legal professionals from self-dealing with respect to client trust funds. Prior to adoption of the challenged IOLTA rule, licensed legal professionals placed client trust funds in non-interest-bearing accounts. In effect, these non-interest-bearing client deposits amounted to interest-free loans to the banks in which they were placed and generated additional profit making opportunity for those institutions. Before the challenged IOLTA rule, banks receiving deposits of non-interest-bearing client funds indirectly compensated licensed legal professionals in return for placement of such deposits. This was done through payment of financial incentives for the benefit of the licensed legal professionals or their employers. Licensed legal professionals thus exploited client trust funds for self-gain while the client earned nothing. The availability of financial rewards in return for non-interest-bearing client deposits risked tainting the legal professional's judgment with considerations of self-interest, rather than client-interest, in placing client funds.

The challenged IOLTA rule ameliorates this risk of self-interest on the part of licensed legal professionals by banning non-interest-bearing accounts for client trust funds. It thus requires such client trust funds to be deposited in an interest-bearing account for the benefit of the client whenever the funds can earn net interest for the client; and in

an interest-bearing account for the benefit of an independent nonprofit organization, the Legal Foundation of Washington, when the funds are incapable of earning net interest for the client. In this way, the rule helps remove financial incentives that attended non-interest-bearing client accounts and that created conflicts of interest for licensed legal professionals. The challenged IOLTA rule requires interest earned on IOLTA accounts to be paid to the Legal Foundation of Washington, an independent nonprofit organization created under the authority of the Washington Supreme Court to fund civil justice programs and organizations, including organizations providing legal services to the indigent. Unlike the banks that received non-interest-bearing client deposits prior to the adoption of IOLTA, the Legal Foundation of Washington (LFW) is not in a position to influence licensed legal professionals in placing client funds because the licensed legal professional is *required* to deposit client trust funds that are incapable of generating net interest for the client in an interest-bearing IOLTA account. And, in turn, the LFW directs interest earned on IOLTA accounts to organizations that provide public legal services.

A. History Of IOLTA Relating To Lawyers

Washington's IOLTA program was established by rule of the Washington Supreme Court in 1984 as part of Washington's ethical rules governing the practice of law. *IOLTA Adoption Order*, 102 Wash. 2d 1101, 1102 (1984), JA at 149. As originally adopted, Washington's IOLTA rule applied only to

attorneys. Washington Rule Of Professional Conduct (RPC) 1.14, App. at 99a-102a.

Prior to adoption of the IOLTA rule, Washington's rules of professional responsibility did not govern an attorney's conduct with respect to investing client trust funds held in connection with providing legal services. As the Washington Supreme Court observed in the *IOLTA Adoption Order* in 1984, then existing rules of professional responsibility "d[id] not address the question of whether attorneys must invest such funds for the benefit of clients". *IOLTA Adoption Order*, 102 Wash. 2d at 1102, JA at 149. In general, the rules provided that "attorneys must hold client trust funds in accounts separate from their own funds, and are obligated to maintain complete records and pay the funds over to the clients or others as soon as they are entitled to receive them". *Id.* See also American Bar Association Formal Opinion 348 (1982), concluding that in most instances where a lawyer is entrusted with client funds, the lawyer is merely under a duty to safeguard the funds and is not liable for interest for failing to invest them. At the same time, the *IOLTA Adoption Order* recognized that common law principles relating to trustee ethics informed the ethical conduct of attorneys. JA at 149. In the *IOLTA Adoption Order*, the Washington Supreme Court observed that a trustee may not "misus[e] trust funds for his or her own pecuniary advantage" and "only the interests of the client (as opposed to the interests of the trustee or a third party) can be considered". JA at 163.

In the *IOLTA Adoption Order*, the Washington Supreme Court explained that prior to IOLTA, lawyers "usually" invested client trust funds in

interest-bearing accounts and paid the interest to clients when it was economically feasible to do so. By the same token, the Washington Supreme Court recognized that when Washington lawyers received client trust funds that could not generate net interest for the client, because the costs of establishing and administering an interest-bearing account would exceed any interest that could be earned, "most attorneys" simply deposited the funds into a single non-interest-bearing trust checking account. *IOLTA Adoption Order*, 102 Wash. 2d 1102, JA at 149-50. Such deposits effectively provided interest-free loans to the banks in which they were placed. *See IOLTA Adoption Order*, 102 Wash. 2d at 1102, JA at 150 ("The banks . . . have received the interest-free use of client money."). The court below described the holding banks as receiving "a great windfall from these accounts". *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 842 (9th Cir. 2001) (en banc), App. at 4a.

In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), this Court recognized that two circumstances combined to result in this treatment of client funds. The first was the need for "ready access" to client funds. *Id.* at 160. Second, prior to 1980, federal law prohibited federally insured banks from paying interest on checking accounts. *Id.* Thus, a pooled non-interest-bearing checking account was the banking vehicle available and typically used by lawyers to hold client funds that could not generate net interest for the client. This left to banks the substantial additional value that such non-interest-bearing accounts generated. In 1980, Congress authorized interest-bearing demand accounts, Negotiable Order Of Withdrawal (NOW)

accounts, in limited circumstances. The entire beneficial interest in a NOW account must be in one or more individuals, or a nonprofit organization operated primarily for religious, philanthropic, charitable, educational, political or similar purposes. 12 U.S.C. § 1832.

This federal authorization and limitation is integral to Washington's IOLTA rule. Admission to Practice Rule (APR) 12.1 requires client funds that cannot earn net interest for the client (funds previously deposited in a non-interest-bearing account) to be deposited in a NOW account. Consistent with federal regulations authorizing such accounts, interest on these accounts is paid to the Legal Foundation of Washington, a nonprofit organization created under the auspices of the Washington Supreme Court, for the purpose of funding providers of legal services to indigent people. JA at 166.

With the adoption of IOLTA, for the first time, Washington's rules of professional conduct required lawyers receiving client trust funds to place the funds in an interest-bearing account for the benefit of the client, in every circumstance where they could generate net interest for the client. With the adoption of IOLTA, for the first time, Washington's rules of professional conduct required lawyers who received client trust funds that could not under any circumstances generate net interest for the client to pool the client's funds with other like client funds in an interest-bearing NOW account, commonly known as an IOLTA account. Consistent with federal banking restrictions, the interest on IOLTA accounts benefits a nonprofit organization that provides legal services funding.

Washington's rule authorizes the deposit of client trust funds in an IOLTA account only when it is not possible for the funds to earn net interest for the client. *IOLTA Adoption* Order, 102 Wash. 2d at 1101, JA at 149 ("[W]e make clear that those funds available for the IOLTA program are only those funds that cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client.") In this respect, the rule is "self-adjusting", requiring legal professionals to invest more client trust funds for clients as more cost-effective accounting services become available and make it possible to earn net interest on "increasingly smaller amounts held for increasingly shorter periods of time". *Id.* at 1114, JA at 165. The rule directs attorneys to consider all available means of achieving net interest, by exploring banking mechanisms such as a "pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client". RPC 1.14(c)(2)(ii), App. at 101a. Furthermore, the Court set forth specific criteria for determining whether a client's funds could earn net interest, rather than leaving that determination to the attorney's unfettered and unguided discretion. RPC 1.14(c)(3)(i)-(iii), App. at 101a.

Put differently, there is nothing in IOLTA itself that denies any client the opportunity to earn net interest if it is possible to do so. To be sure, costs unrelated to IOLTA and beyond the control of the Washington Supreme Court might make it relatively more costly for an individual client to earn interest – such as federal income tax regulations, the costs of a

lawyer's time, the fees charged by banks, and the costs involved with tracking an individual client's interest. But these costs are not incurred as a result of IOLTA.[1]

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[1] These costs help explain why the LFW can realize net interest whereas individual clients cannot. *See* Br. of the Chief Justice and Justices of the Supreme Court of Texas as *Amici Curiae* in Support of Respondents. First, a client's net interest is taxable. 26 C.F.R. § 1.61-7. A client would also be taxed if he or she were to control which charitable institution receives the net interest from a NOW account. *See Phillips*, 524 U.S. at 162, 170-71. Second, the LFW quite plainly does not have to pay a lawyer for the time spent establishing and administering an account. Third, it is less costly to administer an interest-bearing account where all the interest is paid to a single recipient than it is to administer such an account where various recipients receive individual portions of all the accrued interest – especially where many individuals contribute varying amounts in principal for different lengths of time. Because IOLTA is self-adjusting, however, if these costs lower to the point where some clients would be able to earn net interest, then IOLTA *requires* an attorney to pursue that course on his or her client's behalf. *See IOLTA Adoption Order*, 102 Wash. 2d at 1114, JA at 165 (if it becomes "possible to earn net interest for clients on increasingly smaller amounts held for increasingly shorter periods of time, more trust money will have to be invested for the clients' benefit under the new rule").

None of this is to say that the State *creates* the property at issue, for this Court has already held to the contrary. *Phillips*, 524 U.S. at 170. Rather, it is to say that costs borne by individual clients who would seek to earn net interest do not have to be borne by the LFW. In other words, the LFW is subject to fewer costs, and it may therefore realize net interest where individual clients could not. Neither the higher costs for individual clients nor the lower costs for the LFW are products of IOLTA itself.

B. History Of IOLTA Relating To Limited Practice Officers

In 1981, the Washington Supreme Court held that the selection and completion of legal documents necessary to effectuate property transactions constitutes the practice of law. *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 635 P.2d 730 (Wash. 1981). At that time, it had become common for such services to be provided by escrow and title companies without the benefit of a lawyer. Shortly thereafter, the Washington Supreme Court adopted rules to license and regulate legal professionals to perform these functions. APR 12. These licensed legal professionals are referred to as "limited practice officers" (LPOs), or sometimes as "certified closing officers".

In 1995, the Washington Supreme Court considered a proposal to apply the state's IOLTA rule to transactions handled by LPOs, in addition to lawyers. The Washington Supreme Court received public comment on the proposal to extend the IOLTA rule to LPOs and solicited argument. In a brief arguing for application of the IOLTA rule to LPOs, the Washington State Bar Association noted that LPOs and lawyers are similarly situated with respect to the rule and pointed out that escrow and title companies employing LPOs were receiving substantial indirect benefits from banks in return for placing non-interest-bearing client deposits. JA at 142-46. The Bar Association's brief expressed concern that such benefits fostered the potential for LPOs serving their own self-interest, rather than client-interest, in handling client funds and in handling their legal transactions. JA at 142-46. It is

worth quoting that brief at some length to illustrate the ethical considerations at stake:

> "Certified closing officers are in the same position as lawyers. . . .
>
> "Escrow companies, title companies, and bank/lending institutions breach their fiduciary duties as trustees whenever they receive benefits from their trust accounts. This Court should not permit certified closing officers, who are licensed by the Court, to facilitate this breach of fiduciary duty . . . . A trustee is prohibited from accepting any benefit from the funds of the beneficiary . . . . The reason for this rule is simple and sound – if the trustee is permitted to receive a benefit, *even indirectly*, he or she will be tempted to use the services of the institution paying the benefit, even if that might not be in the best interest of the beneficiary. The Department of Licensing has recognized this principle in its regulations, providing that escrow companies 'shall hold the funds in trust for the purposes of the transaction or agreement and shall not utilize such funds for the benefit of the agent or any person not entitled to such benefit.' WAC 308-128E-011[2]
>
> "Despite these clear principles of trust law, it is acknowledged that escrow companies and title companies derive an indirect benefit

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[2] The section of the Washington Administrative Code cited in the Brief of the Washington State Bar Association (§ 308-128E-011) was subsequently replaced (with non substantive changes) by Washington Administrative Code § 208-680E-011.

from their client funds held in trust. This Court stated in its letter calling for briefs, 'Both the escrow companies and the title companies admit they receive from their banks significant economic benefits from their trust account deposits.'. . .

"Certified closing officers licensed by this Court should not be permitted to facilitate a breach of trust by their employers, who clearly are deriving a benefit from their customers' funds. However inadequate the ethics of the marketplace, this Court should not countenance its own licensees' participation in this breach . . . ." Brief of Washington State Bar Association in Support of Proposed Admission to Practice Rule 12(*h*) at 28-32 (Feb. 2, 1994), *reprinted in* JA at 142-45.

Two months later, the Washington State Bar Association followed up this point in a letter to the Washington Supreme Court. In that letter, the Bar Association reminded the Court that it had argued in its brief "the impropriety of escrow and title companies deriving indirect benefits from their client funds held in trust, and the particular impropriety of the participation in these activities by closing officers certified by this Court". JA at 146.

The ethical difficulties presented by allowing licensed legal professionals to deposit client funds in non-interest-bearing accounts thus were well-known to the Washington Supreme Court. Non-interest-bearing accounts created additional profits for banks, and those additional profits were used to provide incentives for licensed legal professionals to direct non-interest-bearing client deposits to the offering

banks. Legal professionals thus exploited the client's funds for the legal professional's gain.

These concerns were, of course, well-founded. Petitioners acknowledge that firms employing LPOs received benefits from their banks in return for non-interest-bearing client deposits, in the form of "earnings credits", prior to APR 12.1. Pet. at 5. These credits were a function of the size of the non-interest-bearing deposits, the period the deposits were held, and a contracted percentage rate. They benefited escrow and title companies who used them to pay for accounting and other services provided to them by third parties. This practice existed despite a state regulation that prohibited escrow agents from using such funds for their own benefit. Wash. Admin. Code § 208-680E-011 (an "escrow agent shall be responsible for all funds received from any principal or any party to an escrow transaction . . . and shall not utilize such funds for the benefit of the agent or any person not entitled to such benefit").

Washington's relatively recent consideration of IOLTA in the context of LPOs thus provides clear insight into marketplace opportunities for legal professionals in directing the deposit of client funds when banks are not required to pay interest on such funds. Washington's experience also makes apparent the opportunity for legal professionals to serve self-interest, rather than their client's interest, in placing client funds, in the absence of the IOLTA rule.

Indeed, Petitioners readily acknowledge, as they must, that prior to Washington's adoption of APR 12.1, escrow and title companies "placed customer trust funds into "non-interest-bearing checking accounts" (Pet. Br. at 5) and that "although

banks have not paid interest on escrow accounts, in lieu thereof they have provided what are referred to in the industry as "earnings credits'" to escrow and title companies. Pet. Br. at 6. Petitioners explain that "[t]hese credits generally can be applied against fees that otherwise would be payable [by the title and escrow companies] to the bank for a wide variety of services rendered by the bank". Pet. Br. at 6.

As one might expect, this potential for serving self-interest in placing non-interest-bearing client deposits is not limited to LPOs or to the state of Washington. Virginia Legal Ethics Opinion No. 1440 (1991) (available at Westlaw, VA LE Op. No. 1440) responds to an inquiry concerning the propriety of a law firm accepting proffered banking concessions in exchange for maintaining non-interest-bearing client accounts in the offering bank. The Virginia Opinion concludes that, absent full disclosure and client consent, "it is improper for a lawyer or a law firm to earn interest or receive any dividends for the lawyer's or firm's benefit on client's funds held in an attorney trust or escrow account . . . . An offer by a bank of tangible or substantial consideration or reward for the opening or maintaining of deposits in attorney trust or escrow accounts is the equivalent, in practice and in effect, of the payment of interest on the deposits." The Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Opinion No. 1986-5 (July 14, 1986) (available at 1986 WL 293094) considered whether an attorney acting in the capacity of an escrow agent could retain interest on the client's escrow account. The New York Opinion concluded that "[l]awyers may not retain . . . any of the interest earned in interest-bearing escrow accounts unless they have

obtained the prior knowing consent of their clients and the other parties to the escrow, and even with such consent, there are still serious risks of ethical impropriety. . . . [A]greements purporting to grant consent to such arrangements present a clear danger of overreaching . . . . This is so because the lawyer would have a financial interest in delaying the event that terminates the escrow which might conflict with his duty to his client and other parties relating to the funds." Likewise, the North Carolina State Bar, Linking Trust and Business Accounts, Ethical Opinion RPC 150 (Jan. 15, 1993) (available at 1992 WL 753132) concluded that it "could create ethical problems" if a client's funds are placed in a non-interest-bearing account that earns the client "credits" if the attorney uses the client's credits to offset charges on the attorney's own business account.

The Washington Supreme Court adopted the challenged IOLTA rule for transactions handled by LPOs. In all relevant respects, the rule is identical to the rule that applies to lawyers. Thus, APR 12.1(c)(3) protects clients by requiring LPOs to deposit client trust funds in an interest-bearing account for the benefit of the client whenever it is possible to earn net interest for the client. As is the case with lawyers, APR 12.1(c)(1) also requires LPOs to pool client funds that cannot earn net interest for the client in an interest-bearing NOW account, with interest paid to the Legal Foundation of Washington. Thus, the challenged IOLTA rule ensures that when a client's funds are not able to generate net interest for the client, the funds will not be placed in a non-interest-bearing account and used to benefit the legal professional, creating the potential for conflicts of

interest. Rather, the rule requires the funds to be pooled with like-client funds in an IOLTA account, with interest on the account used to provide public legal services.

C. Proceedings Below

Petitioners filed a complaint in the United States District Court for the Western District of Washington, challenging APR 12(h) and 12.1. The plaintiffs were two clients of LPOs whose escrow funds were placed in an IOLTA account (Brown and Hayes), an LPO (Daugs), a former LPO (Maxwell), and the Washington Legal Foundation, a public interest law organization. Petitioners alleged that APR 12(h) and 12.1 take property without just compensation and violate the First Amendment.

On cross motions for summary judgment, the district court held that owners of funds deposited in an IOLTA account had no cognizable claim to IOLTA interest, because their funds could not have generated such interest in the first instance. Finding such an interest "a prerequisite to establishing either a First or Fifth Amendment claim", the district court granted summary judgment to Respondents. App. at 92a, 96a. Petitioners appealed.

While hearing on Petitioners' appeal was pending in the Ninth Circuit, this Court decided *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). There, in the context of a Fifth Amendment challenge to a Texas' IOLTA rule, the Court held that interest earned on IOLTA accounts is the property of the clients whose principal is deposited in the accounts. The Court expressly declined to consider whether the Texas IOLTA rule constituted a taking or, if it did, what

compensation, if any, would be owed clients. *Phillips*, 524 U.S. at 172.

Subsequently, a three-judge panel of the Ninth Circuit reversed the district court and held that Washington's IOLTA rule falls within the narrow class of government action that constitutes a per se taking. The panel remanded Petitioners' Fifth Amendment claim to the district court for a determination of "just compensation", if any. The panel did not reach Petitioners' First Amendment claim. App. at 84a. Respondents petitioned for rehearing and rehearing en banc. Respondents' petition was granted, and the decision of the three-judge panel was vacated.

On rehearing en banc, the Ninth Circuit first addressed Petitioners' standing. It held that two Petitioners, Brown and Hayes, LPO clients, had standing because their funds were actually placed in IOLTA accounts. *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 847-48 (9th Cir. 2001) (en banc), App. at 4a, 13a-15a. Two other plaintiffs, Daugs and Maxwell, an LPO and a former LPO, lacked standing because neither owned the principal deposited in an IOLTA account. Finally, the Washington Legal Foundation did not have representational standing. *Washington Legal Found.*, 271 F.3d at 848-50, 15a-19a. The petition for certiorari did not challenge these holdings. Thus, the only proper Petitioners before this Court are Brown and Hayes, and the Justices' references to "Petitioners" should be understood to refer only to Brown and Hayes.

Addressing the merits, the en banc court agreed that Petitioners "Brown and Hayes have a property right to whatever interest their individual

deposits generate". *Id.* at 852, 22a. But the court held that APR 12.1 is not within the narrow class of government actions that constitute per se takings, determining it "entirely appropriate to apply *Penn Central*'s *ad hoc* takings analysis to the IOLTA program". *Id.* at 854-57, 27a-32a.

Applying that analysis, the court below noted that "because no interest would be earned on client funds deposited by escrow and title companies absent the IOLTA program, requiring those companies to place client trust funds in IOLTA accounts has no economic impact on the owners of the principal". *Id.* at 857, 33a. The court below also rejected Petitioners' contention that they suffer an economic impact if banks no longer give earnings credits to escrow agents. As a factual matter, the contention failed because Brown and Hayes did not establish that they were charged higher escrow fees. As a legal matter, the contention also failed because earning credits are payments to the escrow companies, not to clients such as Brown and Hayes, and such indirect economic impact is not recognized in a takings analysis. *Id.* at 858-60, 34a-35a.

The court below went on to hold that "the IOLTA program could not have interfered with [Petitioners'] investment-backed expectations", because Washington's rules require funds to be put in IOLTA accounts only if they are incapable of generating net interest. *Washington Legal Found.*, 271 F.3d at 860, 38-39a. As for the character of the government action, the court held that IOLTA "is best viewed in the context of the industry it regulates", and it noted that "the ability to practice a profession—and the conduct expected of those who do—is . . . heavily regulated", and "[l]awyers have

always been held to the highest legal and ethical standards". *Id.* at 861, 39a. "Viewed in this context, the IOLTA regulations are not out of character for either the commercial industry or the professions they affect." *Id.* at 861, 39a-40a.

Finally, the court below held that even if Petitioners' property was taken, "the compensation due Brown and Hayes for any taking of their property would be nil". *Id.* at 861, 41a. Just compensation requires the government to put the owner in as good a position as if the property had not been taken, and incidental losses are not compensable. Accordingly, the court below held that Petitioners are entitled to no compensation because by regulatory definition their funds were only subject to IOLTA if they could not earn net interest. *Id.* at 862, 42a. And, furthermore, Petitioners' "right to keep their principal from earning interest . . . has no economic value". *Id.* Having found no taking of Petitioners' property and no just compensation due in any event, the court below then remanded the case to the district court for further consideration of Petitioners' First Amendment claim. *Id.* at 864, 45a.

SUMMARY OF ARGUMENT

I. With rare and narrow exception, this Court conducts an ad hoc factual inquiry to determine if a challenged regulation "goes too far" in imposing burdens that should be more broadly borne and thus effects a "taking" within the meaning of the Fifth Amendment. Petitioners request extraordinary treatment of Washington's IOLTA rule in asserting that it should be subject to per se takings analysis. Contrary to Petitioners' suggestion, when the property allegedly taken is money, this Court has employed the usual ad hoc inquiry. Taxes, tariffs,

user fees, and monetary assessments are all instances in which the government literally "takes money" from private parties, and yet none are considered "takings" under the Fifth Amendment, and all are scrutinized under an ad hoc analysis (or do not implicate the Takings Clause at all).

II. Under the ad hoc analysis appropriate to consideration of Washington's rule, IOLTA does not "take" Petitioners' property. First, it serves important regulatory purposes in helping to ensure ethical treatment of client trust funds by licensed legal professionals. It is neither remarkable nor extreme in its operation. Second, it has no economic impact on Petitioners. By definition, their funds are put into an IOLTA account only if the client could not otherwise earn net interest under any circumstances. Third, IOLTA does not interfere with Petitioners' reasonable investment-backed expectations. Petitioners had no expectation to earn anything from the funds that are subject to IOLTA.

III. Even if IOLTA effects a taking of Petitioners' property, "just compensation" due to them is zero. The Fifth Amendment requires compensation for the value taken from the owners, not the value gained by the government. But the value of the property "taken" from Petitioners is zero, for the only property subject to IOLTA would not generate a net gain for Petitioners if they attempted to earn interest for themselves. Thus the property allegedly taken from Petitioners – IOLTA interest – has no realizable value to Petitioners, and the "just compensation" due is nothing.

IV. Even assuming that IOLTA "takes" Petitioners' property and that some "just compensation" would be due to them, Petitioners are

not entitled to the remedy of an injunction. First, the federal courts should not grant Petitioners any remedy – equitable or otherwise – unless and until Petitioners seek a remedy using available and adequate state proceedings. If this Court holds that IOLTA takes Petitioners' property and that just compensation is due, Washington has an available and adequate procedure that Petitioners can use to obtain their just compensation remedy, Washington's inverse condemnation procedure.

Furthermore, even if a federal court could grant a remedy at this time, the appropriate relief would not be an injunction. Injunctive relief is not available when there is an adequate remedy at law, which there is in this case: a monetary award. Even assuming that injunctive relief is appropriate when a monetary award is exactly equal to the money taken by the government, that proposition does not help Petitioners, since the value of anything taken would be less than the value received by the government.

ARGUMENT

I. AD HOC ANALYSIS IS THE APPROPRIATE FRAMEWORK FOR EVALUATING WASHINGTON'S IOLTA RULE

Except in extraordinary circumstances, whether government regulation effects a taking under the Fifth Amendment "depend[s] on a complex of factors including the regulation's economic effect . . . the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action". *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). As recently as last Term,

the Court reaffirmed the broad application of ad hoc takings analysis and the Court's long resistance "to adopt what amount to *per se* rules in either direction". *Tahoe-Sierra Pres. Coun., Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1478 (2002) (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)). As the Court explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), "[i]n 70-odd years of . . . regulatory takings jurisprudence [succeeding *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)], we have generally eschewed any set formula for determining how far is too far, preferring to engage in essentially ad hoc factual inquiries". (Internal punctuation omitted.)

A. IOLTA Does Not Fall Within Either Of The Two Narrow Categories Of Per Se Analysis

In only two limited instances this Court has employed a per se test, finding that certain kinds of deprivations are automatically deemed "takings" under the Fifth Amendment. First, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve". *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Second, this Court has "found categorical treatment appropriate . . . . where regulation denies all economically beneficial or productive use of land". *Lucas*, 505 U.S. at 1015.

In both instances, the Court stressed the narrowness of the two circumstances. *See Loretto*, 458 U.S. at 441 ("Our holding today is very narrow."); *Lucas*, 505 U.S. at 1018 (noting "the relatively rare situations where the government has deprived a landowner of all economically beneficial uses"). *See also Tahoe-Sierra Pres. Coun.*, 122 S. Ct. at 1479 & n.19 ("physical appropriations are relatively rare [and] easily identified" while "*Lucas* carved out a narrow exception to the rules governing regulatory takings for the 'extraordinary circumstance' of a permanent deprivation of all beneficial use"). Indeed, as recently as the last two Terms, this Court has continued to reject pleas to establish more per se rules. *See id.* at 1478 ("In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case."); *Palazzolo*, 533 U.S. at 628 ("a blanket rule . . . is too blunt an instrument"); *id.* at 636 (O'Connor, J., concurring) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted.").

Washington's IOLTA rule implicates neither of these narrow circumstances. Petitioners do not contend otherwise, but nevertheless assert that per se takings analysis should be applied to APR 12.1. Petitioners are wrong. Petitioners would have this Court erect yet another per se rule, contending that when, in Petitioners' parlance, the government "takes money", it should categorically be treated as a taking. Pet. Br. at 13. The suggestion is flawed. It is enormously overbroad. The circumstances in which transfers of money or monetary value attend government action are so varied that it is simply not a useful categorization.

B. This Case Provides No Basis For Creating A Third Category Of Per Se Analysis

This Court has repeatedly held that many instances in which the government "takes money" –

by requiring payment either to the government or to a third party – are subject to an ad hoc analysis and are often not "takings" at all. For example, in the literal parlance of Petitioners, taxes and tariffs clearly "take money" from a private party, yet neither is subject to a per se analysis or thought to violate the Takings Clause at all. *See Penn Central Transp. Corp. v. City of New York*, 438 U.S. 104, 124 (1978) (taxes). *See also County of Mobile v. Kimball*, 102 U.S. 691, 703 (1880) (taxes); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1879) (tariffs).

Similarly, a user or service fee that, quite literally, "takes money" from private parties, is not a taking either. *United States v. Sperry Corp.*, 493 U.S. 52, 63 (1989) ("[A] reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services."). In *Sperry Corp.*, the Court also rejected the argument that a payment of money should be analyzed as a physical appropriation of property.

> "It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. . . . If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services[.]" *Sperry Corp.*, 493 U.S. at 62 n.9.

As *Sperry Corp.* recognized, "[s]uch a rule would be an extravagant extension of *Loretto*." *Id.* See also *Yee v. City of Escondido*, 503 U.S. 519, 529-30 (1992), recognizing that simply because a particular regulatory scheme may make the transfer of wealth "more *visible* than in the ordinary case . . . the existence of the transfer itself does not convert regulation into physical invasion". (Citation omitted.)

Further, the government may require one private party to assume a monetary liability and pay that sum to a third party – again, literally "taking money" from one private party and giving it to another – but that does not necessarily "take" a person's property within the meaning of the Fifth Amendment. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225, 228 (1986) (O'Connor, J., concurring) (holding that the Multiemployer Pension Plan Amendments Act of 1990 did not constitute a taking, although "there is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability") ("the mere fact that legislation requires one person to use his or her assets for the benefit of another will not establish . . . a violation of the Taking Clause") (internal punctuation omitted) (citation omitted). Instead, such a requirement is examined under the usual ad hoc factual inquiry ordinarily employed in takings cases.

For instance, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court considered a takings challenge to the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act). Under the Coal Act, Congress required certain companies to make monetary payments to a Combined Fund for the purpose of providing health benefits to retired coal miners. The plurality was quite candid about the sizable "annual premiums" imposed on the liable companies – as much as $5 million in a single year. *Apfel*, 524 U.S. at 514, 517 (O'Connor, J.). "By operation of the Act," the plurality further observed,

"Eastern is permanently deprived of those assets." *Id.* at 523 (quoting *Connolly*, 475 U.S. at 222). But despite this clear deprivation, the plurality concluded that the case "d[id] not present the 'classic taking' in which the government directly appropriates private property for its own use", specifically commenting that monetary "liability is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a *per se* taking". *Id.* at 522, 530. Rather, the Court applied an ad hoc analysis. *Id.* at 528 ("applying the three factors that traditionally have informed our regulatory takings analysis").[3]

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), also used an ad hoc analysis even though the regulation at issue literally "took money". At issue in *Webb's* was whether a statute authorizing a county to keep interest earned on interpleaded funds, in addition to a separate service fee, constituted a taking of the interest. The *Webb's* Court did not simply identify the interest as the

[3] Justice Kennedy would have gone even further. Rather than apply an ad hoc analysis, he found it "both imprecise and . . . unwise" to apply the Takings Clause at all when the monetary assessment "neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms". *Apfel*, 524 U.S. at 540, 543 (Kennedy, J., concurring in the judgment and dissenting in part). That view was shared by the four dissenting Justices. *See id.* at 555-56 (Breyer, J., dissenting). While Petitioners in this case may have a "specific property interest", the concurring and dissenting opinions in *Apfel* illustrate that government regulations that "take money" come in many forms and variations, and this Court should be cognizant of those nuances and wary of adopting any per se rule that glosses over these distinctions.

property of Webb's creditors, declare a per se taking, and end its inquiry, as Petitioners would have the Court do in this case. Rather, the Court weighed the public and private interests involved and found a taking "under the narrow circumstances" of that case only after concluding that there was not "any reasonable basis to sustain the taking of the interest". *Webb's*, 449 U.S. at 163-64. The Court considered the nature and purpose of the government's action, the legitimate expectations of Webb's creditors, and the statute's economic effect on them. In this respect, the Court examined possible justifications for the county's retention of the interest (*see id.* at 162-63), noted the necessity of resorting to the statute if the depositor was to have any protection from creditor claims (*id.* at 164), and considered that "Webb's creditors . . . had more than a unilateral expectation" in the interest earned on the interpleaded funds (*id.* at 161).

Simply put, to describe the government's action as "taking money" from a private party does little to advance the legal inquiry, and to assert that every time the government "takes money" it is a per se taking disregards this Court's precedents regarding such deprivations. There are simply too many disparate circumstances where the government "takes money", in many of which the government's act either does not implicate the Takings Clause at all or is analyzed under *Penn Central Transportation Corp.'s* ad hoc factual inquiry.

Petitioners argue that "where, in order to fund government programs of general application, the government simply takes property from a few individuals and can offer no rational explanation for singling them out", then a per se rule ought to

apply. Pet. Br. at 26-27. It is of course true that if this Court asks "what would justify" the circumstances in which a government regulation takes money, and "[n]o police power justification is offered for the deprivation", the regulation can effect a taking. *Webb's*, 449 U.S. at 162-63. But that is not because a per se analysis applies, as Petitioners would have it; as shown above, the Court applies an ad hoc analysis even when government regulations literally "take money". It is because the "bare transfer of private property" to the government, with no discernible regulatory justification, is an easy case under the standard ad hoc analysis.[4] *Sperry Corp.*, 493 U.S. at 62 n.8.

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[4] It may be appropriate to look for supporting evidence of the State's legitimate regulatory purpose. For example, the Court might look to whether the seizure actually serves the regulatory purpose asserted. *See Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring in the judgment) ("the means, as well as the ends, of regulation must accord with the owner's reasonable expectations"); *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part). On that score, IOLTA furthers its ethical purpose by removing the interest from the hands of the very actors – the banks and legal professionals – who have an incentive to engage in unethical conduct if the interest were left in their possession.

Or this Court might look to whether the amount seized is "so clearly excessive as to belie [its] purported character", making the seizure look more like a "bare transfer of private property". *Sperry Corp.*, 493 U.S. at 62, 62 n.8. Again, on that score, IOLTA's regulatory purpose rings true in light of its minimal imposition and utter lack of excessiveness. *Compare Webb's*, 449 U.S. at 158 (interest accrued was over $90,000), *with infra* pp. 32-37. Finally, this Court might look to whether there is an "'average reciprocity of advantage' to everyone concerned". *See Lucas*, 505 U.S. at 1018. Yet again, on that

But even assuming that Petitioners' contention had any merit – that a "bare transfer" with "no police power justification" should be analyzed as a per se taking – that argument would have no application here. Petitioners' proposed rule appears to be crafted to exempt measures like taxes and user fees, for which the government's police power justification is usually obvious and clear. But IOLTA, too, serves an important regulatory purpose and is justified by something entirely different from a "bare" desire to transfer wealth to the government. *See infra* Part I.C. IOLTA itself, that is, falls outside the category proposed by Petitioners for per se treatment under the Takings Clause.

C. IOLTA Serves Important Regulatory Functions

Washington's IOLTA rule benefits and protects clients by regulating licensed legal professionals in handling client funds. It does this in two ways. First, whenever client funds are capable of earning net interest for the client, the rule requires the licensed legal professional to place client funds in an interest-bearing account for the client. Prior to IOLTA, this neither was required by ethical rules governing licensed legal professionals, nor uniformly done. The rule thus provides a clear economic benefit to Petitioners and, as discussed below, protects them against LPO self-dealing by

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score, the clients receive a substantial benefit from IOLTA, because ethical treatment of their funds is protected in all cases, as a legal professional is *required* to use interest-bearing accounts for the client's benefit whenever net interest can be attained, or, when net interest cannot be obtained, the interest is taken out of the hands of those who might otherwise act unethically with the client's funds.

requiring their funds be placed in an interest-bearing account. Second, when client funds cannot earn net interest for the client, the rule requires the funds to be pooled with like client funds in an interest-bearing account with interest payable to a nonprofit corporation, created by direction of the Washington Supreme Court, to fund organizations providing civil legal services, including legal services to the indigent.

Both aspects of the challenged rule protect clients who place funds with licensed legal professionals. This is so because, as Petitioners concede, prior to IOLTA, LPOs and escrow and title firms employing them received substantial financial benefits from banks in return for non-interest-bearing client deposits. These financial benefits, "earnings credits", increase with the size and length of the deposit. In this respect, earnings credits are a function of the fact that prior to IOLTA, banks had interest-free use of client funds. Earnings credits present clear opportunities for licensed legal professionals to serve self-interest, rather than client-interest in placing client funds and handling client transactions. They provide incentive to deposit client funds in non-interest-bearing accounts. They also provide incentive to deposit client funds to maximize the escrow or title companies' return on client deposits, without regard to other considerations such as the depository's strength or stability, or its responsiveness to client needs. Similarly, earnings credits provide an incentive to delay closings of property transactions, as disbursement of client funds terminates their receipt.

By requiring productive client funds to be deposited in an interest-bearing account for the

client, and by requiring pooling of client funds incapable of generating net interest for the client in an interest-bearing IOLTA account, the challenged rule diminishes the potential for LPO self-interest that plainly existed before its adoption. Removing incentives for harmful conduct or the evasion of regulatory prohibitions is well within the government's police power. *Andrus v. Allard*, 444 U.S. 51, 58-59 (1979). This is particularly important in the courts' regulation of those practicing law, since confidence and trust are critical elements in an attorney-client relationship. Proper operation of the legal system requires measures to prevent erosion of confidence in legal professionals. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995). The absence of potential financial interests promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice. In this respect, the IOLTA rules operate to provide benefits to the legal system that outweigh any harm Petitioners can claim here, similar to the systemic benefits provided by upholding the attorney-client privilege. *See Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

Unless licensed legal professionals are required to deposit client funds in interest-bearing accounts of some nature, such deposits would continue to present opportunities for self-interested dealing between banks and licensed legal professionals. Certainly, in this case, it is clear that in the absence of IOLTA, client funds would continue to be placed in non-interest-bearing accounts and would be used to provide financial incentives to LPOs and the escrow and title companies who

employ them in the practice of law. Such financial incentives are at odds with the ethical obligation of licensed legal professionals to avoid self-interest in handling client property.

Banking mechanisms for earning interest on nonproductive client funds while keeping them immediately available to clients are limited by federal law. Federal banking regulations, unchallenged by Petitioners, require such accounts to "consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit". *Phillips*, 524 U.S. at 161 (quoting 12 U.S.C. § 1832(a)(2)). That IOLTA employs this banking option to accomplish its regulatory purposes is not constitutionally significant. Indeed, Petitioners, like the petitioners in *Phillips*, do not appear to argue that placing their small and/or short-term deposits, incapable of generating net interest, in an IOLTA account, implicates the Takings Clause. And, of course, Petitioners' Fifth Amendment claim would be no different had Washington directed interest on IOLTA accounts to another nonprofit charitable foundation or to an individual. In enacting IOLTA, the Washington Supreme Court properly was "the judge of the necessity or expediency of the means adopted". *Andrus*, 444 U.S. at 59 (quoting *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31, 40 (1908)).

In each of these respects, the rule substantially furthers the public welfare. It safeguards important interests of clients whose

deposits it regulates, and it benefits the justice system.

II. UNDER AD HOC ANALYSIS, APPROPRIATE TO WASHINGTON'S IOLTA RULE, THE RULE DOES NOT "TAKE" PETITIONERS' PROPERTY

The Takings Clause "preserves governmental power to regulate, subject only to the dictates of 'justice and fairness'". *Andrus*, 444 U.S. at 65 (citing *Penn Central*, 438 U.S. at 123). Government regulation does not implicate the Takings Clause unless it "goes too far" (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)), and "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Whether government regulation goes too far "depend[s] on a complex of factors including the regulation's economic effect . . . , the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action". *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Penn Central*, 438 U.S. at 124). As the Court recognized in *Palazzolo*, these are among the factors that inform the question of whether government regulation "goes too far". Under such an analysis, IOLTA clearly does not "take" Petitioners' property within the meaning of the Fifth Amendment.

A. IOLTA Interferes With No Reasonable Investment-Backed Economic Expectations Of Petitioners

IOLTA expressly permits – indeed, it requires – licensed legal professionals to deposit client funds

to earn net interest for the client if that possibly can be achieved. In other words, IOLTA's very terms ensure that it has no economic impact on Petitioners. The only client funds that may be deposited in IOLTA accounts under Washington's rule are funds that cannot otherwise earn net interest for the client. As this case demonstrates, such funds would not have been put in an interest-bearing account at all, absent the challenged IOLTA rule. Thus, it cannot be said that the rule interferes with any reasonable investment-backed expectations of clients. Petitioners in this case readily admit that they had no expectation of earning a return on these funds. App. at 38a-39a. Nor does IOLTA interfere with accomplishing any purpose for which Petitioners transferred their funds to the commercial marketplace in the first instance. Under IOLTA, client funds surrendered to a legal professional and deposited in an IOLTA account remain available to the client without delay, and accomplish all of their intended purposes. APR 12.1(c), App. at 105a-06a.

Petitioners argue that it is inappropriate to determine the effect of IOLTA on their economic expectations by considering those expectations in a "hypothetical pre-IOLTA world". Pet. Br. at 32. There is nothing hypothetical about the pre-IOLTA world or Petitioners' reasonable economic expectations in it. Prior to Washington's adoption of APR 12.1, no rule of professional conduct required escrow or trust companies engaging in the practice of law to secure interest on behalf of clients, even when client deposits could generate net interest for the client. When Congress authorized the creation of NOW accounts in 1980, before IOLTA even existed or was expanded to include LPOs, these accounts were

permitted only for deposits that "consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, political, or other similar purposes and which is not operated for profit". 12 U.S.C. § 1832(a)(2).

Second, it is far from apparent how Petitioners would have one evaluate the effect of a regulation on a claimant's reasonable investment-backed economic expectations without considering what those expectations were independent of the challenged regulation. Certainly, for example, if one were to evaluate the impact of a land use regulation on the land owner's reasonable economic expectations, one aspect of the inquiry would be the landowner's economic expectations with respect to the property in the absence of the challenged rule. *Palazzolo*, 533 U.S. at 635-36 (O'Connor, J., concurring) ("Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred."). There is no basis for a different approach here. It is Petitioners who seek to have the Court consider their claim against the backdrop of a world that never has existed, where Petitioners could generate net interest on the funds that they placed with LPOs.

Petitioners further contend that evaluating their economic expectations in the absence of the challenged IOLTA rule is tantamount to claiming that IOLTA interest is "'government created value' to which petitioners can have no claim". Pet. Br. at 34. This is not so. Respondents recognize the Court's holding in *Phillips* that interest earned on IOLTA

accounts is the property of clients whose funds are placed in the accounts. But the fact that a regulation affects property of a claimant or costs a claimant value hardly makes out a takings claim. Although *Phillips* specifically disavowed any view on whether Texas' IOLTA rule constituted a taking, or if it did, whether any payment would be required by way of "just compensation", *Phillips* recognized that "the interest income at issue . . . may have no economically realizable value to its owner". *Phillips*, 524 U.S. at 170. Surely, the fact that Petitioners could enjoy no economically realizable value from their property is a relevant consideration in evaluating the economic effect of the challenged IOLTA rule on Petitioners' reasonable economic expectations. The fact of the matter is that as to Petitioners' reasonable investment-backed expectations, the challenged IOLTA rule is a "wash", "since the client would have no net interest to go into his pocket, IOLTA or no IOLTA". *Phillips*, 524 U.S. at 176 (Souter, J., dissenting). It is this "wash" that Petitioners repeatedly characterize as the "burden" that IOLTA singles them out to bear.

Petitioners also assert that interference with their non-economic interests should lead the Court to conclude that they have suffered a taking by virtue of Washington's IOLTA rule. In this respect, Petitioners point to the Court's statement in *Phillips* that property consists of more than economic value. *Phillips*, at 524 U.S. 169. But this does not assist Petitioners. First, by definition, whenever government regulation entails a cost or diminishes the value of property, its owner loses the right to possess, control, and dispose of the property represented by the cost or lost value. Second, the

right to possess, control and dispose of *money* that has no economically realizable value surely would seem to be a right of diminished and doubtful worth in the context of an inquiry concerned with the extent to which a rule interferes with economic expectations. *Cf. Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) (owners "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking'"). In any event, whatever significance it may have in the takings balance, the loss of such a right hardly would seem to indicate that a regulation has "gone too far" or burdened too greatly.

Finally, Petitioners engage in the artificial exercise of carving out one aspect of Washington's integrated IOLTA rule in arguing that the rule interferes with their reasonable economic expectations. Petitioners look solely to the rule's alleged "cost" to them. The Court has determined that such an approach is artificial in virtually every takings case (*see, e.g., Tahoe-Sierra Pres. Coun.*, 122 S. Ct. at 1481; *Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for So. California*, 508 U.S. 602, 643-44 (1993)), but it is particularly artificial here, as the property allegedly taken – IOLTA interest – would not exist but for the challenged rule. Directing otherwise nonproductive client funds to an interest-bearing account is but one facet of the integrated regulatory framework of IOLTA. It is instrumental to the rule's effectiveness and is not challenged as a taking by Petitioners. Like the Petitioners in *Phillips*, Petitioners here do not seem to seriously argue that requiring LPOs to deposit non-interest-bearing client funds in an

IOLTA account implicates the Takings Clause. *Phillips*, 524 U.S. at 164 ("Respondents do not contend that the State's regulation of the manner in which attorneys hold and manage client funds amounts to a taking of private property."). Instead, Petitioners seek as "just compensation" the very funds generated only by virtue of this process. It is highly contrived then, to look solely to the disposition of interest from IOLTA accounts in considering whether IOLTA interferes with their reasonable economic expectations.[5]

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[5] Petitioners make a passing reference to their right to control their funds and exclude others from using them, even temporarily. Pet. Br. at 35. This appears to be a reference to interest earned on IOLTA accounts. However, to the extent that this is a separate takings claim based on the deposit of Petitioners' principal in an IOLTA account, and to the extent that it is even fairly encompassed in the questions presented in their petition for certiorari, the claim has no merit. Viewed either as an independent claim under an ad hoc analysis or as a component of alleged economic or investment-backed harm in the principal takings claim, the argument fails. The banking industry is so heavily regulated that Petitioners can have no reasonable expectation of unfettered use of their funds, or to control who may benefit from them, once they put them in the commercial marketplace and they are deposited into a bank account. *See, e.g.*, 12 U.S.C. § 4002 (establishing complex scheme dictating when funds deposited in cash, by check, or otherwise become available for withdrawal by the depositor). Finally, Petitioners argue that they are entitled to unfettered control over who benefits from their funds. Given the extensive regulation of banking and the fact that banks survive by providing deposits for the use of others, this claim lacks merit. But to the extent there is any substance to the contention, it is a claim that sounds in First Amendment free speech doctrine, and thus it is more properly addressed on remand in the context of that argument.

B. IOLTA Protects Clients Of Legal Professionals And Promotes The Public Welfare

IOLTA serves legitimate and important regulatory purposes. It requires licensed legal professionals to handle client funds in ways that ensure (1) the funds earn net interest for the client whenever they are capable of doing so; (2) are not used for the benefit of the licensed legal professional when they are incapable of earning net interest for the client; and (3) in the latter circumstance, are placed in an interest-bearing account that funds public legal services, including legal services for the indigent. In each of these respects, the rule substantially furthers the public welfare. It safeguards important interests of clients whose deposits it regulates, and it benefits the civil justice system. Moreover, contrary to Petitioners' claim that they are arbitrarily singled out for application of IOLTA, Petitioners encounter the rule and benefit from its protections precisely because they interact with legal professionals in a regulated aspect of the profession. The handling of client property and the avoidance of conflicts of interest are facets of the practice of law that have long been regulated. APR 12.1 is unremarkable in this respect.

C. Petitioners' Argument Based On "Lost" Earnings Credits Fails

Perhaps recognizing the futility of trying to show that Washington's IOLTA rule interferes in any significant way with their reasonable investment-backed expectations, Petitioners assert that they nonetheless "lost" an indirect economic benefit by virtue of IOLTA. Petitioners had no expectation of return in the form of "earnings

credits" based in marketplace practices or in law. Based on the marketplace practices, Petitioners not only could expect to receive nothing on their deposits, but also could expect their deposits to be used for the financial benefit of their escrow providers with the secondary benefit – if any – indirect and entirely discretionary. Further, Petitioners could expect legal constraints on escrow agents' use of the funds to avoid self-dealing. Wash. Admin. Code § 208-680E-011 (emphasis added), clearly states that an "escrow agent shall be responsible for all funds received from any principal or any party to an escrow transaction . . . and shall not utilize such funds for the benefit of the agent or any person not entitled to such benefit".[6]

Moreover, the indirect economic loss alleged by Petitioners consists entirely of the possibility that some escrow and title companies may have chosen to pass on to their clients any overhead cost savings that the companies may have realized in return for depositing client funds in non-interest-bearing accounts, prior to IOLTA. Such attenuated economic circumstances are irrelevant to whether the

[6] In their Cert. Reply at 7, Petitioners claim that "the Washington State Department of Licensing (which regulates escrow companies in the State) has long been aware of, and approves of, the 'earnings credits' system". Petitioners provide no citation for this claim, but apparently they refer to a 2-page letter from the Department of Licensing that they appended to their reply brief before the Ninth Circuit. That letter fails to even mention § 208-680E-011 or its predecessor § 308-680E-011. Nor does the letter even mention "earnings credits". And for good reason – the letter requesting the Department of Licensing's opinion also neglected to mention "earnings credits" or either section of the Washington Administrative Code. The opinion provides no definitive ruling on whether the "earnings credits" system is consistent with this regulation.

government has taken Petitioners' property. The Takings Clause does not recognize every conceivable and alleged loss as part of an owner's reasonable investment-backed expectations. "A 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (quoting *Webb's*, 449 U.S. at 161). It necessitates a legitimate claim of entitlement based on positive rules of substantive law or mutually explicit understandings. *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972); *Penn Central Transp. Co.*, 438 U.S. at 124-25.

Petitioners have acknowledged, as they must, that they have no property interest in earnings credits received by escrow and title companies. *A fortiori,* Petitioners have no property interest in the private discretionary pricing decisions of escrow or title companies related to the companies' enjoyment of earnings credits. Petitioners point to no authority supporting the notion that such discretionary pricing decisions of private third parties play any role in a takings claim. They do not. Otherwise, any consumer of goods or services from a business whose pricing decisions are affected by regulatory costs could press a takings claim. This would be a massive expansion of the Takings Clause, ungrounded in its provisions and its history. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co.*, 260 U.S. at 413. Thus, even if Petitioners could show that their escrow providers charged them higher fees because their providers lost earnings credits as a result of IOLTA (and neither made such

a showing), it would not matter. Except insofar as earnings credits vividly demonstrate the potential for conflicts of interest in handling non-interest-bearing client funds, and the resulting need to direct those funds to interest-bearing accounts, they are irrelevant to the inquiry before the Court.

In sum, when one actually considers the valid and important regulatory purposes that IOLTA serves and its nonexistent economic effect on Petitioners or their investment-backed expectations, it is difficult to understand how it could be said that IOLTA "is so unreasonable or onerous as to compel compensation" (*Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001)), or otherwise put, that it "goes too far" and forces Petitioners to bear a "burden" that "in all fairness and justice, should be borne by the public as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49 (1960)). To the contrary, the IOLTA rules substantially protect Petitioners' interests in their relationship with licensed legal professionals, and the economic "burden" the rule allegedly imposes on them is illusory.

III. EVEN IF THE IOLTA RULE CONSTITUTES A TAKING, JUST COMPENSATION TO PETITIONERS WOULD BE ZERO

The purpose of "just compensation" under the Fifth Amendment is to place the property owner in the same economic position that the owner would have been in absent the government regulation. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979); *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945); *Olson v. United States*, 292 U.S. 246, 255 (1934); *Dohany v. Rogers*, 281 U.S. 362,

367 n.1 (1930). Consequently, the measure of "just compensation" is the value taken from the owner, not the value gained by the State. "[T]he Constitution . . . merely requires that an owner of property taken should be paid for what is taken from him. . . . And the question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). *See also City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 710 (1999); *United States v. Causby*, 328 U.S. 256, 261 (1946); *United States ex rel. Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 281-82 (1943). Even if APR 12.1 effected a taking of IOLTA interest, it is undisputed that Petitioners would not have realized interest on their funds absent the rule. Indeed, it is plain that Petitioners' funds never would have been placed in an interest-bearing account at all without IOLTA, and thus, Petitioners would have earned *no* interest on their funds, gross *or* net. *Cf. Phillips*, 524 U.S. at 169 ("[I]t is not that the client funds to be placed in IOLTA accounts cannot generate *interest*, but that they cannot generate *net interest*."). Thus, the amount of compensation necessary to return Petitioners to the position they were in prior to the adoption of IOLTA is zero.

In seeking IOLTA interest as "just compensation", Petitioners do not ask to be placed in their pre-IOLTA position. Petitioners seek substantial betterment of that position – payment of value that they could not have realized. This is contrary to the Court's jurisprudence under the Fifth Amendment. Rather than address this bedrock principle relating to the proper measure of "just compensation", Petitioners endeavor to attribute to

the court below and to the Respondents the position that government may confiscate property where it confiscates only what it has created (Pet. Br. at 36); and that government may take property and deny just compensation "simply because of . . . difficulty in measuring the property owners' loss with precision". Pet. Br. at 37. The court below did not premise its "just compensation" holding on any such notions, and the Justices do not advance them.

Petitioners' only acknowledgment of the fundamental principle that "just compensation" is limited to restoring the claimants' pre-taking economic position is a passing reference in footnote 14 of their brief. Pet. Br. at 36. There, Petitioners assert that even if the appropriate measure of "just compensation" is the amount necessary to put them in the economic circumstances they enjoyed prior to IOLTA, they would be entitled to the value of "earnings credits" "that would have been applied to their real estate transactions absent IOLTA", and that there is a genuine issue of material fact about the value of those credits. Pet. Br. at 36. Petitioners are wrong on both counts. Earnings credits are irrelevant to the issue of compensation, just as they are irrelevant to the takings inquiry. "Just compensation" does not include incidental losses related to a taking. *United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979); *General Motors Corp.*, 323 U.S. at 382. The value of earnings credits amounts to nothing more than an alleged incidental loss. Petitioners have no property interest in earnings credits and no property interest in the private discretionary pricing decisions of escrow and title companies related to the availability of earnings credits. Second, Petitioners failed to demonstrate

that the value of earnings credits would have reduced the cost of *their* real estate transactions, or even to raise a genuine issue on that score. Tellingly, for their contention on this point, Petitioners cite only to JA at 51-52, an affidavit from the LPO who handled the closing of Petitioner Hayes' real estate transaction. The LPO simply states that sometime after APR 12.1 was adopted, Seafirst Bank stopped paying earnings credits to her employer, Fidelity National Title Company. The LPO's affidavit does not even suggest that Fidelity Title would have passed on to Petitioner Hayes the value of any such credits had the company continued to receive them, or that it did so before the IOLTA rule was adopted. Petitioner Hayes acknowledged that he did not know how Fidelity Title set its fees. JA at 122.

In sum, Petitioners' request for compensation in this case asks the Court to turn a blind eye to economic reality. The Fifth Amendment does not require what Petitioners demand – that government "pay for a loss of theoretical creation, suffered by no one in fact". *Boston Chamber of Commerce*, 217 U.S. at 194.

IV. INJUNCTIVE RELIEF IS NOT APPROPRIATE

Petitioners argue that when an owner's property is taken within the meaning of the Fifth Amendment, and the property taken "is money", then the "most appropriate" remedy is equitable relief. Pet. Br. at 39. This argument is without merit. It is without merit because Petitioners are entitled to no relief at all and because they are entitled to no relief in a federal court – equitable or otherwise – unless and until they first seek appro-

priate relief in state proceedings. If this Court holds that IOLTA "takes" Petitioners' property and that some "just compensation" is due, then Petitioners must seek their remedy in the first instance before a state court. Petitioners' argument is also without merit because equitable relief is unavailable whenever there is an adequate remedy at law. Here, Petitioners have not shown that a monetary remedy is inadequate.

A. Federal Courts Should Not Grant Relief In A Takings Case Unless And Until The Owner Seeks Available Relief In State Proceedings

It is well established that "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied". *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 n.13 (1985). "If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." *Id.* at 194-95 (internal punctuation omitted). *See also First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"); *Hudson v. Palmer*, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring); *Ruckelshaus*, 467 U.S. at 1016 ("Equitable relief is not available to enjoin an

alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.") (footnote omitted). Accordingly, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation". *Williamson County*, 473 U.S. at 195. "The nature of the constitutional right", this Court held, "requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action". *Id.* at 194 n.13. *See also* JA at 12 (Petitioners' claims arise under § 1983).

Washington provides "an adequate procedure for seeking just compensation", namely, an action for inverse condemnation. *See, e.g., Phillips v. King County*, 968 P.2d 871, 876 (1998). The Just Compensation Clause requires use of this procedure before obtaining a remedy in federal court. Petitioners correctly observe that if "the inverse condemnation procedure is unavailable or inadequate", there is no need for an owner to avail him- or herself of that procedure. *Williamson County*, 473 U.S. at 197; Pet. Br. at 44. But this observation does not assist Petitioners. Washington's procedure is neither unavailable nor inadequate. Petitioners simply discount the procedure because the Justices of the Washington Supreme Court, who Petitioners sued, are defending IOLTA against Petitioners' allegations that it effects a taking and violates the First Amendment.

The Ninth Circuit did not address the adequacy of state law takings remedies as Petitioners assert. It addressed only the ripeness of Petitioners' takings claim in this case. App. at 19a-21a. The Ninth Circuit simply concluded that Petitioners were not required to seek compensation in state court in order for their claim to be considered ripe in light of the Justices' defense of APR 12.1. App. at 21a. The Justices do not take issue with the ripeness determination of the court below, although the Washington Supreme Court, acting in its judicial capacity, has reviewed rules promulgated by the court in its legislative capacity. *See, e.g., Nielsen v. Washington State Bar Ass'n*, 585 P.2d 1191 (Wash. 1978) (holding invalid a provision of Admission to Practice Rules requiring a resident alien bar applicant to have declared intent to become a citizen). Nonetheless, Petitioners could have reasonably anticipated that had they presented their just compensation claim to the Washington Supreme Court, the Court would have likely rejected that argument, and so resort to such a procedure might have been futile. But the Justices' defense of APR 12.1 against Petitioners' takings claim has no bearing on the adequacy of an inverse condemnation action if this Court determines that just compensation may be available to Petitioners. The United States Constitution, as interpreted by this Court, is the supreme Law of the Land, and "the Judges in every State shall be bound thereby". U.S. Const., art. VI, § 2. If this Court were to hold that IOLTA "takes" Petitioners' property and that some

"just compensation" may be due, the Justices of the Washington Supreme Court unquestionably would follow that judgment and enforce it, in an inverse condemnation proceeding or otherwise.

Petitioners' argument that they nevertheless are entitled to injunctive or other relief from a federal court must therefore rest on the assumption that "*after a decision* [by this Court] that IOLTA effects a taking and requires compensation", the Justices would refuse to obey that decision. Pet. Br. at 47 (emphasis added). Petitioners' argument improperly asks this Court to attribute to Washington's highest judicial body an utter lack of respect for the rule of law. *See Dombrowski v. Pfister*, 380 U.S. 479, 484 (1965) ("It is generally to be assumed that state courts . . . will observe constitutional limitations as expounded by this Court."). The federal courts accordingly should not provide Petitioners with a remedy before the state has had an opportunity to do so.

B. Even If A Federal Court May Grant A Remedy, Injunctive Relief Is Not Appropriate

"It is a fundamental principle of long standing that a request for an injunction will not be granted as long as an adequate remedy at law is available." *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.22 (1985). Further, "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions. Especially is this true where . . . those

institutions are ready, willing, and . . . able to remedy the deprivation of constitutional rights themselves." *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990). Assuming that some just compensation is due to Petitioners, they have an adequate remedy at law, namely, a monetary award of any value taken from them.

Petitioners argue, however, that when the property taken is money, the appropriate remedy is an injunction. Pet. Br. at 18, 38. They point to the plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which observed that where the government "takes" a monetary payment, monetary relief against the government would require the state to compensate owners for the very dollars "taken", and that, in turn, "would entail an utterly pointless set of activities", namely, a dollar-for-dollar exchange. *Apfel*, 524 U.S. at 521. The implicit assumption of *Apfel* is that when the Coal Act requires payment of a company's money, the just compensation due is exactly equal to the amount of the monetary payment required under the Act. But the same is not true of IOLTA. Assuming the interest on Petitioners' IOLTA funds is "taken", the value of that interest to Petitioners is something less than the value received by the Legal Foundation of Washington. That is because individual clients who seek to earn interest from those funds would be subject to greater costs than those borne by the LFW. *See supra* p. 7; note 1. And, as noted earlier, the Fifth Amendment requires compensation only for the value taken from the owner, not the

value received by the government. Consequently, the implicit assumption of *Apfel* – that the amount of compensation due is exactly equal to the amount collected by the government – is not present in this case. Petitioners themselves seem to recognize this point. *See* Pet. Br. at 42 ("if the IOLTA program is held to violate the Takings Clause, Washington State could be required . . . to refund *some* or all of the very money it had just collected") (emphasis added). Because any just compensation due would be something less than the interest collected by the LFW, injunctive relief is not appropriate.

Petitioners' only remaining argument for injunctive relief is that claimants would have to use Washington's inverse condemnation remedy, and it may not be particularly convenient or economical. Pet. Br. at 42. This argument simply ignores the well-settled rule that the Fifth Amendment does not prohibit the taking of private property for a public purpose when a suit for compensation subsequent to the taking is available. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949). Petitioners' position would radically alter takings jurisprudence. Cost and inconvenience inhere in eminent domain and inverse condemnation actions, just as cost and inconvenience inhere in virtually every legal remedy. Petitioners' position effectively would negate the ability of government to take private

property for public purposes at all, rendering meaningless the conditional authority granted to it by the Fifth Amendment.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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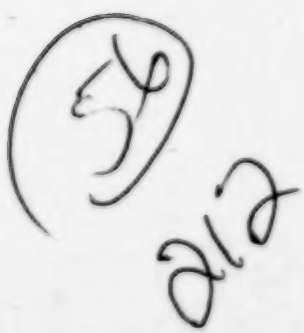

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Supreme Court, U.S.
FILED
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CLERK

No. 01-1325

IN THE
Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Date: November 18, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR PETITIONERS

In *Phillips,* this Court established that the interest paid on clients' IOLTA accounts is the property of clients. *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998). Throughout this litigation, Respondents and their *amici* have emphasized the good work accomplished by IOLTA funds -- which in 2001 totaled at least $162,000,000 nationwide. AARP Br. 11 n.14. How did the IOLTA programs get all this money? In plain English, they took it.

In our opening brief, we urged that a *per se* taking should be found in those situations where the character of the governmental action is such that the consideration of the remaining factors in this Court's *Penn Central* test could not possibly alter the conclusion that a constitutional taking has occurred. We showed further that the Washington IOLTA program, which is a simple appropriation of property from a small number of people to fund a government program of general application, should be found to be a *per se* taking.

Respondents and their *amici* argue that the appropriation of interest is, in fact, justified by a regulatory purpose directed at temptations associated with the handling of client money by lawyers and real estate professionals. Justices Br. 8-14, 27-31, 37-38; LFofW Br. 21-23. In essence, they argue that the IOLTA program is really a prophylactic measure to deliver the service providers from temptation, and save clients from unethical behavior of those they hire; so in order to keep providers of legal services from capturing some benefit -- direct or indirect -- from their possession of client funds, IOLTA will protect the clients by taking for itself all of this property of the clients.

For reasons set forth below, this alleged regulatory purpose is a *post hoc* rationalization which this Court should reject as irrelevant. Until their briefs to this Court, Respondents had hardly adverted to this implausible regulatory purpose. Even assuming this regulatory purpose had

indeed been a motivating concern of the IOLTA program, it could not justify the actual appropriation of property. The Bar has many ways of regulating the conduct of those under its authority, including dictating where money may be deposited or simply commanding the avoidance of conflicts of interest of the sort allegedly relevant here. The notion that in order to protect clients it may also seize their property outright, goes far beyond any regulatory justification this Court has found relevant in a takings context.

We argued in our opening brief that the same result should obtain -- and a taking should be found -- even if the IOLTA program is analyzed under the *Penn Central* factors rather than as a *per se* taking. In particular, given the Court's holding in *Phillips* that the interest appropriated under IOLTA is the property of the client, the economic impact and effect on investment-backed expectations are clear. The government has taken, and the client has been denied, an amount of money that is identifiable, albeit small. Surely, this violates the only reasonable expectation that the client could have: if interest is earned, it belongs to him and will not be seized, willy-nilly, by the government.

Respondents and their *amici* nonetheless belabor the same issues argued before this Court in 1998, renewing in new words their rejected argument that a different conclusion should be reached where it is shown that, absent IOLTA, the client would not have received any interest, so that the IOLTA interest is somehow government-created value. Justices Br. 33-36, 40-43; LFofW Br. 17-20, 33-37. But, as the Court stated in *Phillips*, even if it were true that no interest could be earned in the absence of IOLTA, the interest is still the product of the principal of the client, and is thus the property of the client to which the government has no *a priori* claim. To say that the interest is both the client's property and subject to seizure because of the manner by

which it was generated, would be to empty that legal status of all meaning.

Finally, it is entirely clear that any practical form of relief from such a programmatic taking requires equitable action by the Court. The Ninth Circuit's categorical rejection of equitable relief in Takings Clause cases of this sort finds no support in this Court's decisions. *Eastern Enterprises* and earlier cases well recognize the appropriateness of equitable relief from a government program where the purpose of the program is the transfer of money, and the retransfer remedy amounts to an undoing of the program itself. Moreover, the amounts in issue are both identifiable and so small as to make individualized actions for recovery impractical. Thus, a declaration of the unconstitutionality of the IOLTA program as currently constituted is entirely appropriate. It is the only judicial remedy capable of addressing the constitutional wrong.

I. RESPONDENTS' ALLEGED REGULATORY PURPOSE IS AN AFTER-THE-FACT CONTRIVANCE THAT CANNOT JUSTIFY THEIR TAKING PETITIONERS' PROPERTY

Respondents discover a regulatory justification for the IOLTA program: to prevent "self-dealing" by Limited Practice Officers (LPOs) who, prior to the adoption of the IOLTA program, allegedly received financial benefits in return for depositing client funds in favored financial institutions. Justices Br. 8-14, 27-31, 37-38; LFofW Br. 21-23. That argument is contrary to the record, was never asserted by the Justices in adopting the IOLTA program, and could not, in any event, justify the uncompensated taking of Petitioners' funds.

The Washington Supreme Court adopted the IOLTA program in 1984. Its order adopting the program (JA 146-166) explains at length its reasons for doing so; at no point does the order state that the court adopted the IOLTA rules as a means to prevent self-dealing by attorneys in their handling of client funds. Rather, the sole stated purpose was to benefit legal services programs by earning interest on client funds that previously had not generated interest. Indeed, the court explained that clients were not harmed by creation of the IOLTA program *precisely because* clients had no property rights in any interest generated by their funds. JA 152-58. The Supreme Court's September 21, 1995 order adopting APR 12(h) and 12.1 (thereby expanding the IOLTA program to cover LPOs and their employers) was similar and expressed no purpose to protect depositors from self-dealing by escrow and title companies.

Moreover, the IOLTA program could not possibly be deemed a regulation of the escrow industry because, as Respondents admit, the Washington Supreme Court does not regulate that industry and never has. Justices Br. 38 n.6; LFofW Br. 22 n.14. Such regulation has at all times resided within the State's executive branch. *Id.*[1] Prior to 1995,

[1] The Washington Supreme Court claims authority to regulate the practice of law, and it determined in 1981 that the completion of form real estate documents constituted the practice of law. Justices Br. 8. As a result of that determination, the court created a new class of individuals known as "limited practice officers" (LPOs) who were licensed to complete form real estate documents without the assistance of lawyers -- thereby permitting escrow and title companies to continue their longstanding practice of having non-lawyers prepare such documents. In asserting the right to regulate the practice of law, the court has asserted regulatory authority over document preparation by LPOs but not over their employers' other activities. LPOs employed by escrow and title companies often have no involvement with their

(continued...)

regulatory authority over the escrow industry resided with the Washington State Department of Licensing (DOL); in that year, it was transferred to the Washington Department of Financial Institutions (DFI), with DOL regulations being renumbered and readopted by DFI. LFofW Br. 22. Respondents know full well that DOL and DFI have been completely aware of and have never raised any objection to the "earnings credits" system that Respondents now decry and offer as the occasion for the confiscation of Petitioners' property. Indeed, despite Respondents' assertion that the IOLTA program is designed to prevent "self-dealing" by eliminating the earnings credits system, that system remains in place -- with the full knowledge of State regulators.[2]

[1](...continued)
employers' escrow practices.

[2] Although the expansion of IOLTA to cover escrow and title companies has led many banks to eliminate earnings credits, others continue to offer them (albeit at a reduced level) while at the same time paying interest on deposited funds and forwarding the interest to the Legal Foundation of Washington. Pet. App. 111a-112a. At least one title company has avoided being subject to the IOLTA program by getting rid of all its LPOs and requiring clients to hire their own attorneys to perform the document-drafting work formerly performed by its LPOs. JA 59. Thus, that company's ability to generate earnings credits has been unimpaired. At the same time, of course, its clients are faced with higher closing costs (the costs of hiring an attorney) -- a direct result of the 1995 expansion of the IOLTA program.

Contrary to LFofW's claim, earnings credits are *never* granted to affiliates of escrow companies; rather, they are granted solely to the escrow companies themselves and can be used *solely* to offset "fees that would otherwise be payable to the bank for a variety of services rendered by the bank" in connection with the escrow account. Pet. App. 111a. Those services -- including wire transfers and escrow trust

(continued...)

Petitioners bring up these matters not to defend the earnings credits system nor to leave the impression that earnings credits are somehow crucial to their claim, but to show how contrived this supposed regulatory purpose is. This Court should resist Respondents' efforts to craft a *post hoc* justification for their confiscation of Petitioners' funds.

In any event, Respondents' regulatory justification is insufficient to defeat Petitioners' Takings Clause claims. Respondents contend that the IOLTA program is intended to protect escrow depositors from "LPO self-dealing." Justices Br. 27. But this "protection" is carried out by confiscating funds from IOLTA depositors that, *Phillips* held, belong to the depositors. Citing *Andrus v. Allard*, 444 U.S. 51, 58-59 (1979), Respondents assert, "Removing incentives for harmful conduct or the evasion of regulatory prohibitions is well within the government's police powers." Justices Br. 29. That assertion misses the mark; such motivations may, in appropriate circumstances, justify *regulation* of private property, but they can never justify uncompensated *confiscation* of private property, particularly where (as here) the government seeks to justify its actions as a means of protecting the very person whose property is being confiscated.

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[2](...continued)
accounting services -- "are of significant value to those whose funds have been deposited in escrow accounts," *id.*, and are provided by banks without charge only because of the availability of earnings credits. Although federal law has long prohibited banks from paying interest on checking accounts, the Federal Reserve Board has ruled that the granting of earnings credits to escrow companies does not constitute the payment of interest. JA 76-80.

Even if -- contrary to the record and Respondents' admissions -- the Washington Supreme Court could establish that it possessed authority under Washington law to prohibit banks from granting earnings credits to escrow companies, its IOLTA program still could not pass muster under the Takings Clause. Respondents cite only one "benefit" bestowed on depositors by the IOLTA rules: they require lawyers and LPOs "to place the funds in an interest-bearing account for the benefit of the client where they could generate net interest for the client." Justices Br. 5. But as the Washington Supreme Court admitted when it established the IOLTA rules, professionals were already in most instances generating interest for their clients in those circumstances. JA 149-150. Moreover, the regulatory goal Respondents now assert -- of ensuring that escrow depositors are earning interest on their funds whenever possible -- does not begin to explain how Respondents are justified in taking the interest for themselves when the depositors could not earn (what Respondents call) "net interest."[3] If the Supreme Court's regulatory goal had been to prevent alleged "self-dealing" by escrow companies in those instances in which "a positive net return" cannot be generated for depositors (perhaps by depositing client funds not in the most financially stable banks but in those conferring the greatest benefits to the escrow companies),

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[3] The IOLTA rules require that, in determining whether client funds can generate a "positive net return for the client," an attorney or LPO should subtract from projected gross interest not only the fees charged by the bank but also all overhead costs incurred by the attorney or LPO in establishing and administering a separate interest-bearing account. RPC 1.14(c)(3) and APR 12.1(c)(3), set forth at Pet. App. 101a, 107a. Thus, the IOLTA rules preclude an attorney/LPO from arriving at an agreement with his/her client regarding what, if any, overhead expenses are to be charged against the gross interest that could be earned by the client.

then it could have adopted a rule prohibiting such actions without also confiscating Petitioners' property. For instance, a rule requiring that client funds only be deposited in appropriately insured institutions would serve that purpose.[4]

In the course of arguing that the IOLTA program should be upheld under the *Penn Central* balancing test, Respondents cite the preceding regulatory purposes as "legitimate and important regulatory purposes" that should weigh on the "no taking" side of the scale. Justices Br. 37; LFofW Br. 23. Even assuming that the *Penn Central* test has some application to this case, Respondents' efforts to invoke their alleged regulatory purposes in this manner are unavailing. They seem to suggest that their regulatory regime should be judged under something akin to a rational basis test. *See, e.g.*, LFofW Br. 23 (challenged rules "reasonably advance important public purposes"). But this Court has made clear that such deferential review of government economic regulation is confined to equal protection and due process cases and has no place in Takings Clause analysis. *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834 n.3 (1987). Rather, even when a property owner seeks an award of some discretionary benefit, the government may not demand that the owner cede some of his property in return for grant of the benefit unless there is an "essential nexus," *id.* at 837, and "rough proportionality" between the government's legitimate regulatory interests and exaction of the property it demands.

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[4] The IOLTA program does, in fact, require funds held by attorneys or escrow companies to be deposited only in institutions insured by either the federal government or the Washington Credit Union Share Insurance Fund. RPC 1.14(c), APR 12.1(c); Pet. App. 100a, 105a. Indeed, the requirement that client funds be deposited in insured institutions long pre-dates the adoption of IOLTA.

Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).[5] There can be no "rough proportionality" where, as here, property owners are not asking for *any* discretionary benefit yet are nonetheless faced with confiscation of their property for the supposed purpose of protecting them from others.

All this is perhaps an overly elaborate refutation of an argument the mere statement of which refutes it: that the IOLTA program protects the clients' property by taking it.

II. BY TAKING ALL IOLTA INTEREST, LFofW TAKES PROPERTY OF A DEFINITE AND EASILY ASCERTAINABLE VALUE: THE DOLLAR VALUE OF THE INTEREST TAKEN

Respondents rehearse a number of familiar takings doctrines to defeat the clients' claims. They remind the Court that in determining just compensation, it is the loss suffered by the deprived owner that counts, not the gain to the government. Justices Br. 41; LFofW Br. 36. In this connection they refer throughout to the amount clients lose as their "net benefit" or "net interest" on IOLTA deposits. *Id.* They rely on the *Penn Central ad hoc* balancing test to argue that the clients have no investment-backed expectation in the moneys that IOLTA confiscates. And from this they draw the conclusion that there is no Fifth Amendment violation and no just compensation is due because, they claim, Petitioners have lost nothing. All this persiflage cannot obscure the simple fact that the precise value of one dollar is one dollar,

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[5] In rejecting the dissent's contention that the government's property demands were "a species of business regulation that heretofore warranted a strong presumption of validity," *Dolan* went on to explain, "Simply denominating a government measure as a 'business regulation' does not immunize it from constitutional challenge on the grounds that it violates a provision of the Bill of Rights." *Id.*

and that Petitioners suffer one dollar of loss every time a dollar is confiscated from them.

A. That a Client Cannot Show a Decrease in His Net Worth as a Result of LFofW Taking His Property Is Irrelevant to His Claim

Phillips establishes that the interest generated in IOLTA accounts is the property of the clients whose money is deposited in those accounts. *Phillips,* 524 U.S. at 160. That is precisely what IOLTA takes.[6] Respondents emphasize that the clients' deposits could not yield a "net" benefit to the clients, because bank charges, fees that might be charged by their real estate professionals/lawyers to cover overhead in accounting for and transmitting the funds, and any costs associated with tax accounting would exceed the small amounts of interest earned. At the end of the day in an IOLTA-free world, Respondents contend, the clients' wallet would be not one inch fatter.

This whole line argument is irrelevant. IOLTA supporters made exactly the same arguments in *Phillips*,

[6] The IOLTA rules strictly limit the fees that banks are permitted to charge against the interest generated by IOLTA accounts; all other fees must be billed to the account holder. RPC 1.14(c)(4)(i), APR 12.1(c)(4)(i); Pet. App. 101a-102a, 108a. In that manner, Respondents ensure that a steady income stream continues to flow in LFofW's direction. That stream generally amounts to between $2.5 and $4.0 million per year. *Id.* 7a. LFofW incurs virtually no expenses in collecting those funds. The small sums confiscated from Petitioners and thousands of similarly situated individuals -- funds that are viewed as "pennies from heaven" by IOLTA supporters -- in the aggregate add up to the hundreds of millions of dollars accruing to IOLTA programs nationwide. *See generally,* Kristi L. Darnell, "Pennies From Heaven -- Why *Washington Legal Foundation v. Legal Foundation of Washington* Violates the U.S. Constitution," 77 WASH. L. REV. 775 (2002).

citing precisely the same line of cases. As the Court paraphrased their argument: "it is not that the client funds to be placed in IOLTA accounts cannot generate *interest*, but that they cannot generate *net interest*." *Phillips*, 524 U.S. at 169 (emphasis in original). And the Court deemed the argument wholly irrelevant to the Takings Clause analysis, explaining, "The government may not seize rents received by the owner of a building because it can prove that the costs incurred in collecting the rents exceed the amount collected." *Id.* at 170. *That is this case*. Respondents never come to grips with this obvious point; instead, they come back with the same analysis that has already failed.

We must take as a premise that the IOLTA interest -- all of it -- is the clients' property.[7] We do not dispute, because it is irrelevant, that obligations to, and charges by third parties might leave the clients with no more coins in their pockets even if they were allowed to opt out of the IOLTA program. The contention is irrelevant because there are myriad circumstances that may prevent a property owner from enjoying at the end of the day an increase to his net worth from the receipt of a particular item of property. A person may be in the hands of his creditors so that whatever money comes to him immediately passes away to others. He may be under obligations to ex-wives or children. He may have contractual arrangements that oblige him to pay the money over to third parties -- such as to lawyers who incurred overhead expenses in assisting him in obtaining the property. None of this is any of the confiscating government agency's business. This is the simple and obvious point behind *Phillips*'s reference to the seizure of rents. Depositors

[7] Respondents have not asked the Court to reconsider its decision in *Phillips*, and the possibility of reconsideration is not comprehended in any of the questions presented in this case.

allowed to opt out of the IOLTA program may well be subject to such third-party obligations -- to the banks, to his real estate professional/lawyer, to his accountant, to the tax collector -- but that is his own business. A depositor's liabilities to third parties do not justify the government in doing him the favor of taking his money so he would not incur or satisfy those obligations. Perhaps he prefers to pay his money over to his tax professionals/lawyers, to his accountant, to a bank, even to the IRS, rather than to LFofW. That is his prerogative. As the Court said in *Phillips*:

> [O]ur conclusion in this regard was premised on the longstanding recognition that property is more than economic value . . . it also consists of the group of rights which the so-called owner exercises in his dominion of the physical thing, such as the right to possess, use and dispose of it . . .

Id. at 170. In this case, that right includes the right to pay the gross interest earned on his deposit to those to whom he stands in contractual relations.[8]

The Justices seek to distinguish *Phillips*'s analysis by insisting not only that IOLTA depositors would be unable on their own to earn "net interest," but that they would be unable to earn any interest at all. Justices Br. 41. The evidence submitted by Petitioners suggests otherwise. But we

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[8] For example, as noted above, before the 1995 expansion of IOLTA, banks generally were willing to grant earnings credits on escrow funds. Pet. App. 111a. An escrow depositor might rationally prefer that whatever benefit is derived from the use of his funds go to his escrow company rather than to LFofW. In a competitive market, this could result in lower fees to the client. But even if it did not, it does not matter. The client need not have an economic rationale for wanting to control the disposition of what this Court has said is his property.

are willing to accept, for purposes of argument, the Justices' contention that *no* proffered fee payment by an IOLTA depositor to his real estate professional/lawyer, no matter how large, could induce the latter to place deposits in an interest-bearing account. Even if true, this would be irrelevant. As we have said, in light of *Phillips* it cannot be denied that the interest actually generated by Petitioners' funds is their property. Respondents' story about how IOLTA has made possible the creation of value would only be relevant if Respondents were willing to argue explicitly that this is government-created value and therefore subject to confiscation by the government. But that very argument was pressed most particularly by the Solicitor General as *amicus curiae* in *Phillips*, and the Court rejected it. 524 U.S. at 170-71. It should now be put to rest.

B. The Value of the Interest Taken Is Just the Dollar Amount of That Interest

Once the premise is accepted that the IOLTA interest taken by LFofW belonged to the clients, all of the supposed difficulties in this case disappear -- difficulties in valuing what has been taken, in discovering the clients' investment-backed expectations, and in determining how to calculate just compensation. Petitioners Brown and Hayes have supplied all the evidence necessary to calculate the amount of interest income confiscated from them: the principal amount, the number of days the principal sat in an IOLTA account, and the interest rate interest paid on those accounts. JA 49, 50-52, 53, 54-55. LFofW tells us that the interest earned by Brown and Hayes on their IOLTA deposits was less than $5 and $2, respectively. LFofW Br. 6, 8. So be it. What then was the amount of the loss? Somewhat less than $5 and $2. The amount is small, but that is irrelevant. "The Fifth

Amendment draws no distinction between grand larceny and petty theft." *Hodel v. Irving*, 481 U.S. 704, 727 (1987) (Stevens, J., concurring).[9] The amount taken is perfectly definite and calculable -- as LFofW's own calculations demonstrate.

The easy calculability of Petitioners' losses explains why we are largely indifferent between a *per se* Takings Clause analysis (which we think best fits the facts of this case) and the *Penn Central ad hoc* analysis. Respondents attempt to make heavy weather of the *Penn Central* "investment-backed expectation" factor. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). But it is the reasonable expectation of every property owner that the government will pay him just compensation if it seeks to confiscate his property. Thus, Brown and Hayes have reasonable investment-backed expectations that they will be reimbursed $5 and $2, respectively, for the property that was confiscated from them. It is not a very large expectation -- it's only $5 and $2; but nothing in *Penn Central* suggests that reasonable expectations need be honored only if they exceed some minimum dollar amount.

In asserting that "just compensation" in this case is zero, Respondents attempt to rely on a line of cases that indicates that the measure of compensation is the loss to the property owner, not the "gain to the taker." *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1948), LFofW Br. 33-40; Justices Br. 40-43. That reliance is misplaced. Any claim that the loss suffered by Petitioners Brown and Hayes was zero is inconsistent with *Phillips*'s holding that they were the owners of funds (with a readily ascertainable

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[9] We note, however, that both Brown and Hayes regularly buy and sell real estate, JA 53, 54, and thus continue to be subject to confiscation of their funds by IOLTA programs.

value) that were confiscated from them. It is also inconsistent with *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 162 (1980), which held that a Takings Clause claim based on confiscation of interest income does not require a showing that the claimant had any right to insist that interest be paid on his funds.

Moreover, Respondents are misapplying the loss-to-the-owner-not-gain-to-the-taker line of cases by invoking it in support of an argument that Petitioners are entitled to *no* compensation. In every one of the cases cited by Petitioners or the Ninth Circuit, the plaintiffs were entitled to *some* compensation; the only issue was the amount of compensation to be paid for confiscated property that (unlike the money confiscated in this case) was difficult to value. Also, in many of these cases, the plaintiff was trying to take advantage of the government's need to go forward with an important public project and to "hold up" the government for premium compensation based on the government's need to obtain the plaintiff's property. *See, e.g., City of New York v. Sage*, 239 U.S. 57, 61 (1915) (land needed by city to construct reservoir; just compensation does not include increased value of land brought about by government decision to construct reservoir). Here, there is no argument that Petitioners are trying to take advantage of the government's particularized need for their property. Rather, it is LFofW that is attempting to take advantage of what it deems a quirk in the banking laws to garner income for itself. LFofW has no need for Petitioners' property in particular; it is just searching for new revenues.

III. EQUITABLE RELIEF IS APPROPRIATE, AND THE COURT SHOULD DECLARE THE IOLTA PROGRAM UNCONSTITUTIONAL AS PRESENTLY CONSTITUTED

When a government takes private property for a public use, the Takings Clause requires "that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (internal quotation marks omitted); *accord Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974). The Ninth Circuit correctly held that no such provision exists here and therefore rejected Respondents' ripeness challenge. Pet. App. 21a. The appeals court nonetheless dismissed (for lack of standing) the three Petitioners who sought equitable relief only, concluding that even if those three could establish a Takings Clause violation, the only "appropriate relief" in Takings Clause cases of this sort "is to provide the property owner with just compensation." *Id.* 19a.[10] Petitioners explained at length in their initial brief why the Ninth Circuit's categorical rejection of equitable relief was error. Opening Br. 37-47.

In response, Respondents do not really take issue with Petitioners' contention that the federal courts ought to be free to consider an award of equitable relief in Takings Clause cases in which the appropriated property is money or in which a State government has failed to provide an adequate

[10] Contrary to the Legal Foundation of Washington, LFofW Br. at 41-42, the issue of standing of Petitioners Washington Legal Foundation, Daugs, and Maxwell was clearly raised in the petition, Pet. 23, and again in Petitioners' opening brief, Br. at 37-38. The issue of standing will be resolved by the Court's resolution of the second question presented.

mechanism to obtain compensation for confiscated property. LFofW Br. 43-48; Justices Br. 43-50. Rather, their principal contention is that injunctive relief is inappropriate in light of the particular facts of this case. *See, e.g.*, Justices Br. 46-47 (if federal courts find a violation and grant compensatory relief to Petitioners Brown and Hayes, then no equitable relief is necessary because the Washington State courts would "follow the judgment" and award compensatory relief to similarly situated individuals seeking compensation for the confiscation of their IOLTA interest).

Moreover, the Justices' response to our arguments on equitable relief underscore the need for entry, at the very least, of declaratory relief that Washington's IOLTA program violates the Fifth Amendment by taking property without any adequate provision for just compensation. That response suggests that the Justices plan to react to any loss in the federal courts by adopting a state-court compensation system that -- because it will require claimants to enter state court repeatedly to obtain compensation for the confiscation of small sums of money -- will fall short of the "adequate provision for obtaining compensation" demanded by *Williamson County*.

Respondents speculate that, if this Court rules for Petitioners on the taking issue, then an adequate mechanism for just compensation will instantly become available, since "Washington judges in future cases will . . . follow the law as announced by the Court in this case." LFofW Br. 46. Respondents claim that the compensation mechanism that would thus be made available would prevent further Takings Clause violations, thereby precluding the need for relief that implicates the IOLTA program's legality on a going forward basis. But assuming, as is no doubt true, that some state compensation remedy would become available if this Court were to find that the client-Petitioners are entitled to

compensation, it does not follow at all that such procedures would be an adequate remedy under the circumstances, or that equitable relief addressing the IOLTA program more generally is unnecessary.[11]

This Court has observed that "it would entail an utterly pointless set of activities" if the government were to appropriate money and then pay a claim for compensation, "for every dollar [taken] . . . would be presumed to generate a dollar of . . . compensation." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998) (internal quotation marks and alterations omitted). In these circumstances, "it cannot be said that monetary relief against the Government is an available remedy," and, accordingly, it is proper for the taking itself to be declared unconstitutional and enjoined. *Id.*; *see also Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 160 (1980) (holding that taking of interest "was obviously uncompensated" and violated Takings Clause). In an attempt to show that such activities would not be pointless here, Respondents argue primarily that a State can take IOLTA interest and then pay less than the face value of the money taken, thereby retaining the remainder for itself. LFofW Br. 44; Justices Br. 48. As discussed above, however, the proper measure of compensation for each dollar of IOLTA interest -- like any other dollar -- is a dollar. Thus, to require each injured party to file a compensation claim, rather than declaring the program as constituted to

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[11] Respondents seek to place the burden on Petitioners to show that the as yet non-existent procedure to provide just compensation would be inadequate. On the contrary, because there currently is no compensation provision for IOLTA takings (as the Ninth Circuit held), the burden rests squarely with Respondents to show that this *status quo* will somehow change. In any event, as discussed in the text, the inadequacy of any conventional legal action as a procedure to compensate for IOLTA takings is readily apparent.

work a constitutional violation, would result in a set of activities as "utterly pointless" as those contemplated in *Eastern Enterprises*.

Moreover, in light of the small increments through which the IOLTA program collects its millions, it is obvious that pursuit of claims for just compensation would be far too costly to be worthwhile for any individual claimant. No doubt this is precisely why Respondents would remand claimants to that Bleak-Housian remedy. It is far clearer here than in *Eastern Enterprises*, therefore, that any conventional legal action for recovery of money would be entirely inadequate for the taking of money at issue, since the cost of the remedy would nearly always exceed any amounts recovered. Notwithstanding the contentions of the Justices Br. 49-50, the availability of equitable relief in these circumstances would not "radically alter takings jurisprudence" by "effectively . . . negat[ing] the ability of government to take private property for public purposes at all." On the contrary, it is the Constitution itself that forecloses the IOLTA program in its present form. Government may not set up a program that arbitrarily seizes small amounts of money from certain individuals, and protect it against challenge by offering a compensation remedy that costs more to pursue than the amounts at stake in the litigation.

Accordingly, Petitioners are entitled to a declaration that the IOLTA program as presently constituted effectuates an unconstitutional taking of property without just compensation.

CONCLUSION

Petitioners respectfully request that the judgment of the Ninth Circuit be reversed.

Respectfully submitted,

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Date: November 18, 2002

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(8)

Supreme Court, U.S.
FILED
AUG 21 2002
OFFICE OF THE CLERK

No. 01-1325

In the

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION; ALLEN D. BROWN; DENNIS H. DAUGS; GREG HAYES; and L. DIAN MAXWELL,

Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does compensation for taking of private property depend solely on whether the owner has been deprived of economic value, or are other elements of the property interest, such as use, control, disposition and the right to exclude, also compensable when categorically appropriated by government?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus files this brief to assist in the consideration of important constitutional issues of property rights. Pacific Legal Foundation (PLF) is a nonprofit organization headquartered in Sacramento, California, with an institutional commitment to a robust enforcement of the Fifth Amendment.

For more than two decades PLF attorneys have been championing property rights in court. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case, Petition for certiorari (Petition), at 2-7.

SUMMARY OF ARGUMENT

In examining Washington State's Interest on Lawyer Trust Accounts (IOLTA) program, the court below wrongly ruled that Petitioners would not be entitled to compensation even if they could show that seizure of their IOLTA-generated interest was a taking; the court based this assertion in part on the contention that any economic element seized would be speculative and conditional in value. Yet the core property interests that have been confiscated go beyond mere economic value; they include freedom to possess, use, and dispose of property, all of which this Court has found compensable when appropriated by government.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The court below wrongly refused to apply per se scrutiny to a program whereby government takes to itself control and disposition of private property, and uses it, potentially, for ideological purposes that the property owner might not support and has no say in choosing—in short, a classic per se taking.

The court below inappropriately applies ad hoc analysis used for regulatory takings to a clear per se seizure. Yet even under ad hoc scrutiny, the seizure of clients' IOLTA-generated interest imposes a taking because its impact is one of economic confiscation; it violates the clients' legitimate expectations that funds designated by this Court as their property would be subject to their disposition and control; the nature of the governmental action is analogous to a physical invasion of private property; and the purpose served by the program is a broad social aim that should be funded by society as a whole rather than an arbitrarily chosen minority. For all these reasons, the decision of the court below should be reversed.

ARGUMENT

I

THE RULING BELOW FLOUTS THIS COURT'S TEACHING THAT THE CORE AND COMPENSABLE ELEMENTS OF PRIVATE PROPERTY ARE NOT CONFINED TO ITS MERE ECONOMIC VALUE

The Fifth Amendment prohibits uncompensated taking of private property. Yet is some private property not covered? Is there a type of legitimately owned private property that can be confiscated by government—i.e., that can be appropriated for government use and disposition in a way understood by the courts to be a taking—and yet no compensation would be due under the Fifth Amendment? As the dissent below notes (*Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 852 (9th Cir. 2002) (Kozinski, J., dissenting)), no cases answer yes; none holds that there is a

species of private property that stands outside the protection of the Takings Clause. Or rather, there is no such case prior to the majority en banc decision below. The ruling talks of property "for which no compensation is due" even when it "has been taken," *id.* at 851. The ruling offers the accrued interest in this case as an example. The majority bases its claim that Petitioners are not owed compensation even if a taking of their property were established, on the observation that Petitioners would not have the property in question—i.e, the accrued interest—if government had not created the interest-generating program in the first place. *Id.* at 852. According to the appellate court, Petitioners seek to be compensated "not for the value of what they lost, but for the value of what the [interest-generating program] has created." *Id.* at 862.

But this mischaracterizes what they are seeking and what they are owed. The Washington IOLTA program requires attorneys to deposit client funds that are nominal in amount into a pooled account whose interest is confiscated by the state in order to fund various legal-services programs. Petition, Statement of the Case, at 2-6. Petitioners do not seek to be compensated merely for any economic value confiscated from them, but for other, nonmonetary but equally fundamental components of their property interest that have been seized or destroyed. Even though the economic harm to Petitioners from IOLTA's confiscation might be debatable, they have also been deprived of the exercise of an essential bundle of rights. The core property rights that have been confiscated are those that this Court identified in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), as the essence of property ownership: freedom to possess, use, and dispose of property, and the right to exclude. In *Lorctto*, the fact that the property's economic value actually might have been enhanced by the taking did not forestall compensation, because these other foundational rights had been subverted. Significantly, this Court relied on *Loretto* in finding that IOLTA-generated

interest is private property: "We have never held that a physical item is not 'property' simply because it lacks a positive economic or market value." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 169 (1998) (citing *Loretto*, 458 U.S. at 437). "While the interest income at issue here may have no economically realizable value to its owner, possession, control and disposition are nonetheless *valuable rights* that inhere in the property." *Phillips*, 524 U.S. at 170 (emphasis added).

In the case at hand, those very rights have been nullified. The right to exclude is denied, as Petitioners are not allowed to prevent a government-designated agency from laying hands on their accrued interest. Likewise, Petitioners are not given a voice in how that interest is to be spent, or by whom; the power to use and dispose of their property is assumed by the state and state-designated authorities. For the appellate court to suggest that because a property interest might have only a debatable economic value, therefore it embodies no "valuable rights" that are compensable if taken, is to flout *Loretto* and *Phillips*, both of which recognize core property rights and interests beyond mere economic value.

This teaching—that mere economic value is not the only property interest to be considered in the takings equation—is implicit in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). In *Webbs*, this Court found that the confiscation of accrued interest in a manner remarkably similar to the one at bar, amounted to a compensable taking. *Webb's* found unconstitutional a court's refusal to distribute to clients interest from their deposits held in a court registry. *Id.* at 164. Compensation was appropriate even though claimants—as with the Petitioners here—earned the interest only because of the nature of the government registry, a fact that undermines the rationale of the appellate court for declaring that compensation would not be appropriate in the case at bar.

While there are indeed cases involving government destruction of the value of private property where compensation has *not* been found appropriate, this is because no taking was found in the first place. For instance, in *United States v. Caltex*, 344 U.S. 149, 163 (1952), oil companies whose facilities were destroyed by the Army in anticipation of an enemy advance during wartime were not owed compensation under the Fifth Amendment, because these destructions were part of the "ravage and burden of war," not deliberative takings whereby property was "appropriated for subsequent use."

Likewise, in *United States v. Central Eureka Mining Co.* the War Production Board's closing of nonessential gold mines was not compensable under the Fifth Amendment, *because no taking was found*; a prohibition on operating the mines—to preserve scarce equipment in the mines—was not a "taking" because a "taking" would have required that the government "occupy, use, or . . . take possession" of the mines, which it did not. 357 U.S. 155, 166 (1958).

Significantly, what the War Production Board did not do in *Central Eureka*, the IOLTA program at bar *does* do—i.e., it *takes possession* of and *uses* Petitioners' accrued interest. In other words, the IOLTA program appropriates powers that *Loretto* says are core elements of the property interest and are therefore compensable if seized. Because the ruling below contradicts this Court's teaching that the compensable elements of the property interest are not confined to a property's mere economic value, this Court should reverse.

II

THE RULING BELOW FLOUTS THIS COURT'S TEACHING BY INSULATING FROM PER SE ANALYSIS A CLEARLY CATEGORICAL TAKING—I.E., ONE WHERE GOVERNMENT APPROPRIATES USE AND DISPOSITION OF PRIVATE PROPERTY

The appellate court, 271 F.3d at 856, refuses to apply per se taking analysis to a confiscation of a type of bank-account interest that this court, *Phillips*, 524 U.S. at 169, has identified as private property. The appellate court's rationale is grounded in an untenable, arbitrary distinction between money and real property. According to the appellate court, ad hoc, not per se, analysis is appropriate where money is alleged to have been taken, because money is "fungible." 271 F.3d at 854 (quoting *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989)). But *Sperry* is an inapposite precedent. As this Court noted in *Phillips*, 524 U.S. at 171, *Sperry* deals only with the question of what analysis should be applied to *fees* for services. Further, even if money is fungible with other money, takings practice recognizes money as a substitute—and instrument for reiumbursement—when nonmonetary property is seized. There is thus a problem of logic and semantics in suggesting that money is categorically and conceptually distinct from other forms of property.

The suggestion that money is a sui generis form of property not deserving of full Fifth Amendment protection, conflicts with this Court's ruling in *Webb's*. In finding that government confiscation of private parties' accrued interest amounted to a compensable taking, this Court, 449 U.S. at 164, analogized to *United States v. Causby, 328 U.S. 256 (1946)*. *Causby* is a physical invasions case, as this Court acknowledged in *Loretto*, 458 U.S. at 437. In other words, far from insisting that allegations of money takings be given ad hoc

analysis, this Court found that appropriation of accrued money interest in *Webb's* worked a categorical taking.

The essence of a per se taking is present when property is actually taken and used by government. *Washington Legal Foundation*, 271 F.3d at 865-66 (Kozinski, J., dissenting); *Central Eureka*, 357 U.S. at 166; *Caltex*, 344 U.S. at 163. There is a "'classic taking' . . . [when] the government directly appropriates private property for its own use.' " *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1480 (2002) (citation omitted). Such a "classic taking" is imposed by IOLTA. This is illustrated by considering factors that also point to the First Amendment violation known as compelled speech. Although First Amendment questions are not directly at issue in this case at this point, the fact that IOLTA has compelled clients to fund organizations that have pursued policy advocacy that clients might not agree with, also shows how IOLTA works a "classic taking." Essential rights of possession, control and disposition have been appropriated by government and by the agencies that government has designated to disburse funds seized from clients.

Controversial initiatives by organizations that have received IOLTA funds in Washington State have included: litigating to expand bilingual education advanced by Evergreen Legal Services (*see Bilingual Education Advocates Win Small Victory in Lawsuit*, Ethnic News Watch, Int'l Exam'r, Aug. 2, 1994, *available at* http://www.lexis.com/research/retrieve/frames?_m=6cd43c9e192979b11f8c5c13d5405f80&csvc=bl&cform=bool&_fmtstr=VKWIC&docnum=1&_startdoc=1&wchp=dGLbVlb-lSllA&_md5=1d48c44c67b50e6c68365ae4153ede98); suing the state Apple Commission for allegedly falsely "luring" migrant farm workers to the area with allegedly distorted radio ads (*see Rights of Farm Workers*, Seattle Post-Intelligencer, June 4, 1995, http://www.lexis.com/research/retrieve/frames?_m=b879eb5

9345c9e7e7085f5dba696bfd6&csvc=fr&cform=free&_fmtstr=XCITE&docnum=1&_startdoc=1&wchp=dGLbVtb-lSllz&_md5=3ec34f7c77e16ee3ed30d49ffa62fbea; and challenging alleged jail crowding (*see* Mize, Jeff, *Gridlock at Lockup*, The Columbian, Jan. 18, 1998, http://www.lexis.com/research/retrieve/frames?_m=cc9b7bebf86684bca0ae197898e9263a&csvc=fr&cform=free&_fmtstr=XCITE&docnum=1&_startdoc=1&wchp=dGLbVtb-lSllz&_md5=6ebf3087f57253538832412bcc0e3ad4). Although these might be worthy causes in many people's estimation, they are nevertheless *policy* pursuits that do not enjoy universal support. Forcing private property owners to pay for policy agendas—without regard for whether the property owners support or oppose the particular policy pursuits—is not just arguably a First Amendment violation, it is the very definition of government appropriation of the beneficial use of private property—i.e., a per se taking.

Indeed, not only are Petitioners themselves denied a say in how their property is used, but even the general public is deprived of a voice in appropriation of money seized by government. The program is accountable neither to the property's owners, nor even the voters whom government is suppose to serve and represent. *See* McMorris, Frances A., *Ruling May Undermine Programs That Fund Legal Services for Poor*, Wall St. J., Sept. 30, 1996, at B12 (noting comment of lawyer challenging constitutionality of IOLTAs that such programs "do an end-run around state legislatures").

This undermining of other rights that results from an initial undermining of property rights, illustrates a truth articulated by Justice Stewart:

> The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . [A] fundamental

> interdependence exists between the personal right to liberty and the personal right in property.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

Because the court below proposes a doctrine that would insulate obvious per se takings from per se analysis, this Court should reverse.

III

EVEN UNDER AD HOC REVIEW, IOLTA WORKS AN ILLEGAL TAKING

This Court opined in *Tahoe-Sierra*, 122 S. Ct. at 1479, that it is "inappropriate" to apply a test from the sphere of regulatory takings to a categorical taking. But even if the IOLTA categorical taking was judged by the "essentially ad hoc, factual inquiries" articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), IOLTA still should be found to work a taking. The first of the three *Penn Central* factors—the "economic impact of the regulation on the claimant" (*Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986))—applies here in a straightforward manner. "Since the Court has already determined . . . that the client has a property interest in IOLTA generated interest, any 'taking' of that property would surely seem to have an economic impact on the client." Hrina, David J., *The Future of IOLTA: Has the Death Knell Been Sounded for Mandatory IOLTA Programs?*, 32 Akron L. Rev. 301, 321 (1999) (citation omitted). What of the counter argument that the amount a client might receive from a pooled trust account is speculative? This contention, whatever its merits, is defeated by the fact that *any* interest generated is recognized by this Court as belonging to the client; the possibility that the client might lack direct access to it shouldn't allow government to confiscate its use and disposition without reimbursement.

"Similarly, it would be difficult to assert that a client cannot satisfy the second of the *Penn Central* factors, that of a 'distinct investment backed expectation.'" *Id.* (citation omitted). Again, because this Court has declared that a client owns IOLTA-generated interest, this Court itself has created an investment-backed expectation that the client would not be deprived of use and disposition. *Id.* Surely any client who knows that money held in trust is capable of earning interest would expect that the interest be paid to him, or at least that it not be arbitrarily seized to support political or ideological groups with which he might not agree. *Id.*

Finally, *Penn Central*, 438 U.S. at 124, requires an analysis of the "character of the governmental action." Infringements are more commonly found to be takings under this prong when they "can be characterized as a physical invasion by government." *Id.* This fact is significant because, as noted above, *Webb's* analogized a taking very much like the one at bar in *Causby*, and *Causby* "is . . . a quintessential physical occupation case, a fact . . . later recognized in *Loretto*." Breemer, J. David, *IOLTA in the New Millenium: Slowly Sinking Under the Weight of the Takings Clause*, 23 U. Haw. L. Rev. 221, 240 (2000).

In any case, this Court has also found that "public program[s] adjusting the benefits and burdens of economic life to promote the common good" can "nonetheless effect a taking." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998). IOLTA confiscates a client's property to serve what government has determined to be broad social purposes promoted by legal service agencies. But the presumed benefit in this arrangement is outweighed by its conflict with a basic Fifth Amendment principle: government should be prevented "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). There is clear injustice in compelling a "dispersed political

minority" to shoulder such a broad public obligation. *See generally* Douglas, Kevin H., Note, *IOLTAS Unmasked: Legal Aid Programs' Funding Results in Taking of Client's Property*, 50 Vand. L. Rev. 1297, 1333 (1997) (accusing IOLTA programs of "quietly confiscating property from a dispersed political minority").

However inappropriate an ad hoc analysis might be in the context of the per se taking worked by IOLTA, even by ad hoc analysis, the seizure of IOLTA-generated interest should be seen as a taking. Therefore, this Court should reverse the ruling below.

CONCLUSION

Because the IOLTA program imposes a categorical taking that appropriates valuable core elements of the property right—principally dominion, use, disposition, and the right to exclude—Amicus respectfully requests this Court to grant Petitioners' request that the decision below be reversed.

DATED: August, 2002.

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(9)

Supreme Court, U.S.
FILED

AUG 22 2002

OFFICE OF THE CLERK

No. 01-1325

In The

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Petitioners,

v.

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Respondents.

On A Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONER

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INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as amicus curiae in support of Petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 205,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, multi-family, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. Protecting our members' fundamental constitutional rights, particularly involving questions of takings and just compensation, has long been an integral part of our activities.

NAHB has been before the Court as an amicus curiae or as "of counsel" to the landowner in a host of critical takings cases. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at*

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[1] Pursuant to Rule 37.6 of this Court, amicus states that its counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

Monterey, Ltd., 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 122 S. Ct. 1465 (2002).

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit has muddled this Court's most clearly enunciated rule on the taking of property – that a taking requires the payment of just compensation. Mixing elements of physical and regulatory takings precedents, the Ninth Circuit opinion turns upside down this clear rule, requiring the calculation of just compensation before finding the existence of a Fifth Amendment takings claim. This Court must clarify that, no matter what other remedies may also be available, a taking requires – at a minimum – the payment of just compensation.

ARGUMENT

I. WHENEVER A GOVERNMENTAL BODY TAKES PROPERTY – ANY PROPERTY – THE REQUIREMENT THAT JUST COMPENSATION BE PAID IS AUTOMATIC.

There are many issues of law and public policy implicated by this case that will be presented to this Court in both written and oral argument. This brief focuses on only one – that just compensation is the remedy when private property is taken by a governmental entity.

While this proposition of law is neither novel nor controversial, the Ninth Circuit's opinion confuses this simple issue. Instead of embracing the simple equation that a taking requires just compensation, the Ninth Circuit instead implied the reverse - that unless there is unequivocal proof of the amount of just compensation required, there can be no taking. "[E]ven if the IOLTA program constituted a taking of . . . private property, there would be no Fifth Amendment violation because the value of their just compensation is nil." *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 864 (9th Cir. 2001). This misstatement of law effectively turns takings law upside down, requiring a calculation of just compensation before a Fifth Amendment taking can be found to exist.

This Court's takings jurisprudence completely contradicts this convoluted reasoning.

The language of the Fifth Amendment prohibits the "tak[ing]" of private property

> for "public use" without payment of "just compensation." As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and " 'the self-executing character of the constitutional provision with respect to compensation,' " (citations omitted) is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking,"compensation must be awarded.

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981)(Brennan, J., dissenting).

Justice Brennan's eloquent dissent, which but for procedural questions would have been a majority opinion with the addition of Justice Rehnquist, became this Court's official majority position six years later.

> Th[e] basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation." (citation omitted).

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987).

The *First English* majority went on to note that, "[this] Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English*, 482 U.S. at 316.[2]

Size of the compensation owed for a taking is also irrelevant to finding the existence of a taking. While noting that forced placement of cable television equipment on apartment buildings might have "only minimal economic impact on the owner," this Court in *Loretto* still required a remand for calculation of just compensation.[3]

Nor does the form property takes affect the rule that a taking requires the payment of just compensation. While real property is often the subject of takings claims, this Court has recognized that other property – including money – is subject to takings claims. For example, this Court in the *Phillips* case found "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."[4]

That the same underlying principles of constitutional law are applied whether real or monetary property is at issue should not be a subject for debate in this case. It is the application of those principles to the facts that is the focus of disagreement here. Still, no matter what takings analysis this Court decides to apply, it should include the premise that a taking requires just compensation.

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[2] The Court went on to cite the following cases in support of this proposition: *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 (1984); *United States v. Causby*, 328 U.S. 256, 267 (1946); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306 (1923); and *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

[3] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

[4] *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998).

This approach should apply no matter what other legal remedies – in addition to just compensation – this Court may find available, as the remedy of just compensation must not be divorced from the finding of a taking.

This simple proposition of law must also not be caught up in a debate over the IOLTA program at the center of this case. If this Court finds that a taking exists, just compensation must be the remedy. "As Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'" *First English*, 482 U.S. at 321 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). And as this Court noted in *Loretto*, takings may be found "without regard to whether the action [which created the taking] achieves an important public benefit."[5]

[5] *Loretto*, 458 U.S. at 434-35.

CONCLUSION

For the reasons stated above, the National Association of Home Builders respectfully requests that this Court clarify the opinion of the United States Court of Appeals for the Ninth Circuit by underscoring that a taking requires just compensation.

DATED: August 22, 2002

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 21 2002
CLERK

(10)

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does compensation for taking of private property depend solely on whether the owner has been deprived of economic value, or are other elements of the property interest, such as use, control, disposition and the right to exclude, also compensable when categorically appropriated by government?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus files this brief to assist in the consideration of important constitutional issues of property rights. Pacific Legal Foundation (PLF) is a nonprofit organization headquartered in Sacramento, California, with an institutional commitment to a robust enforcement of the Fifth Amendment.

For more than two decades PLF attorneys have been championing property rights in court. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case, Petition for certiorari (Petition), at 2-7.

SUMMARY OF ARGUMENT

In examining Washington State's Interest on Lawyer Trust Accounts (IOLTA) program, the court below wrongly ruled that Petitioners would not be entitled to compensation even if they could show that seizure of their IOLTA-generated interest was a taking; the court based this assertion in part on the contention that any economic element seized would be speculative and conditional in value. Yet the core property interests that have been confiscated go beyond mere economic value; they include freedom to possess, use, and dispose of property, all of which this Court has found compensable when appropriated by government.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The court below wrongly refused to apply per se scrutiny to a program whereby government takes to itself control and disposition of private property, and uses it, potentially, for ideological purposes that the property owner might not support and has no say in choosing—in short, a classic per se taking.

The court below inappropriately applies ad hoc analysis used for regulatory takings to a clear per se seizure. Yet even under ad hoc scrutiny, the seizure of clients' IOLTA-generated interest imposes a taking because its impact is one of economic confiscation; it violates the clients' legitimate expectations that funds designated by this Court as their property would be subject to their disposition and control; the nature of the governmental action is analogous to a physical invasion of private property; and the purpose served by the program is a broad social aim that should be funded by society as a whole rather than an arbitrarily chosen minority. For all these reasons, the decision of the court below should be reversed.

ARGUMENT

I

THE RULING BELOW FLOUTS THIS COURT'S TEACHING THAT THE CORE AND COMPENSABLE ELEMENTS OF PRIVATE PROPERTY ARE NOT CONFINED TO ITS MERE ECONOMIC VALUE

The Fifth Amendment prohibits uncompensated taking of private property. Yet is some private property not covered? Is there a type of legitimately owned private property that can be confiscated by government—i.e., that can be appropriated for government use and disposition in a way understood by the courts to be a taking—and yet no compensation would be due under the Fifth Amendment? As the dissent below notes (*Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 852 (9th Cir. 2002) (Kozinski, J., dissenting)), no cases answer yes; none holds that there is a

species of private property that stands outside the protection of the Takings Clause. Or rather, there is no such case prior to the majority en banc decision below. The ruling talks of property "for which no compensation is due" even when it "has been taken," *id.* at 851. The ruling offers the accrued interest in this case as an example. The majority bases its claim that Petitioners are not owed compensation even if a taking of their property were established, on the observation that Petitioners would not have the property in question—i.e, the accrued interest—if government had not created the interest-generating program in the first place. *Id.* at 852. According to the appellate court, Petitioners seek to be compensated "not for the value of what they lost, but for the value of what the [interest-generating program] has created." *Id.* at 862.

But this mischaracterizes what they are seeking and what they are owed. The Washington IOLTA program requires attorneys to deposit client funds that are nominal in amount into a pooled account whose interest is confiscated by the state in order to fund various legal-services programs. Petition, Statement of the Case, at 2-6. Petitioners do not seek to be compensated merely for any economic value confiscated from them, but for other, nonmonetary but equally fundamental components of their property interest that have been seized or destroyed. Even though the economic harm to Petitioners from IOLTA's confiscation might be debatable, they have also been deprived of the exercise of an essential bundle of rights. The core property rights that have been confiscated are those that this Court identified in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), as the essence of property ownership: freedom to possess, use, and dispose of property, and the right to exclude. In *Loretto*, the fact that the property's economic value actually might have been enhanced by the taking did not forestall compensation, because these other foundational rights had been subverted. Significantly, this Court relied on *Loretto* in finding that IOLTA-generated

interest is private property: "We have never held that a physical item is not 'property' simply because it lacks a positive economic or market value." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 169 (1998) (citing *Loretto*, 458 U.S. at 437). "While the interest income at issue here may have no economically realizable value to its owner, possession, control and disposition are nonetheless *valuable rights* that inhere in the property." *Phillips*, 524 U.S. at 170 (emphasis added).

In the case at hand, those very rights have been nullified. The right to exclude is denied, as Petitioners are not allowed to prevent a government-designated agency from laying hands on their accrued interest. Likewise, Petitioners are not given a voice in how that interest is to be spent, or by whom; the power to use and dispose of their property is assumed by the state and state-designated authorities. For the appellate court to suggest that because a property interest might have only a debatable economic value, therefore it embodies no "valuable rights" that are compensable if taken, is to flout *Loretto* and *Phillips*, both of which recognize core property rights and interests beyond mere economic value.

This teaching—that mere economic value is not the only property interest to be considered in the takings equation—is implicit in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). In *Webbs*, this Court found that the confiscation of accrued interest in a manner remarkably similar to the one at bar, amounted to a compensable taking. *Webb's* found unconstitutional a court's refusal to distribute to clients interest from their deposits held in a court registry. *Id.* at 164. Compensation was appropriate even though claimants—as with the Petitioners here—earned the interest only because of the nature of the government registry, a fact that undermines the rationale of the appellate court for declaring that compensation would not be appropriate in the case at bar.

While there are indeed cases involving government destruction of the value of private property where compensation has *not* been found appropriate, this is because no taking was found in the first place. For instance, in *United States v. Caltex*, 344 U.S. 149, 163 (1952), oil companies whose facilities were destroyed by the Army in anticipation of an enemy advance during wartime were not owed compensation under the Fifth Amendment, because these destructions were part of the "ravage and burden of war," not deliberative takings whereby property was "appropriated for subsequent use."

Likewise, in *United States v. Central Eureka Mining Co.* the War Production Board's closing of nonessential gold mines was not compensable under the Fifth Amendment, *because no taking was found*; a prohibition on operating the mines—to preserve scarce equipment in the mines—was not a "taking" because a "taking" would have required that the government "occupy, use, or . . . take possession" of the mines, which it did not. 357 U.S. 155, 166 (1958).

Significantly, what the War Production Board did not do in *Central Eureka*, the IOLTA program at bar *does* do—i.e., it *takes possession* of and *uses* Petitioners' accrued interest. In other words, the IOLTA program appropriates powers that *Loretto* says are core elements of the property interest and are therefore compensable if seized. Because the ruling below contradicts this Court's teaching that the compensable elements of the property interest are not confined to a property's mere economic value, this Court should reverse.

II

THE RULING BELOW FLOUTS THIS COURT'S TEACHING BY INSULATING FROM PER SE ANALYSIS A CLEARLY CATEGORICAL TAKING—I.E., ONE WHERE GOVERNMENT APPROPRIATES USE AND DISPOSITION OF PRIVATE PROPERTY

The appellate court, 271 F.3d at 856, refuses to apply per se taking analysis to a confiscation of a type of bank-account interest that this court, *Phillips*, 524 U.S. at 169, has identified as private property. The appellate court's rationale is grounded in an untenable, arbitrary distinction between money and real property. According to the appellate court, ad hoc, not per se, analysis is appropriate where money is alleged to have been taken, because money is "fungible." 271 F.3d at 854 (quoting *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989)). But *Sperry* is an inapposite precedent. As this Court noted in *Phillips*, 524 U.S. at 171, *Sperry* deals only with the question of what analysis should be applied to *fees* for services. Further, even if money is fungible with other money, takings practice recognizes money as a substitute—and instrument for reiumbursement—when nonmonetary property is seized. There is thus a problem of logic and semantics in suggesting that money is categorically and conceptually distinct from other forms of property.

The suggestion that money is a sui generis form of property not deserving of full Fifth Amendment protection, conflicts with this Court's ruling in *Webb's*. In finding that government confiscation of private parties' accrued interest amounted to a compensable taking, this Court, 449 U.S. at 164, analogized to *United States v. Causby, 328 U.S. 256 (1946)*. *Causby* is a physical invasions case, as this Court acknowledged in *Loretto*, 458 U.S. at 437. In other words, far from insisting that allegations of money takings be given ad hoc

analysis, this Court found that appropriation of accrued money interest in *Webb's* worked a categorical taking.

The essence of a per se taking is present when property is actually taken and used by government. *Washington Legal Foundation*, 271 F.3d at 865-66 (Kozinski, J., dissenting); *Central Eureka*, 357 U.S. at 166; *Caltex*, 344 U.S. at 163. There is a "'classic taking' . . . [when] the government directly appropriates private property for its own use.' " *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1480 (2002) (citation omitted). Such a "classic taking" is imposed by IOLTA. This is illustrated by considering factors that also point to the First Amendment violation known as compelled speech. Although First Amendment questions are not directly at issue in this case at this point, the fact that IOLTA has compelled clients to fund organizations that have pursued policy advocacy that clients might not agree with, also shows how IOLTA works a "classic taking." Essential rights of possession, control and disposition have been appropriated by government and by the agencies that government has designated to disburse funds seized from clients.

Controversial initiatives by organizations that have received IOLTA funds in Washington State have included: litigating to expand bilingual education advanced by Evergreen Legal Services (*see Bilingual Education Advocates Win Small Victory in Lawsuit*, Ethnic News Watch, Int'l Exam'r, Aug. 2, 1994, *available at* http://www.lexis.com/research/retrieve/frames?_m=6cd43c9e192979b11f8c5c13d5405f80&csvc=bl&cform=bool&_fmtstr=VKWIC&docnum=1&_startdoc=1&wchp=dGLbVlb-lSllA&_md5=1d48c44c67b50e6c68365ae4153ede98); suing the state Apple Commission for allegedly falsely "luring" migrant farm workers to the area with allegedly distorted radio ads (*see Rights of Farm Workers*, Seattle Post-Intelligencer, June 4, 1995, http://www.lexis.com/research/retrieve/frames?_m=b879eb5

9345c9e7e7085f5dba696bfd6&csvc=fr&cform=free&_fmtstr=XCITE&docnum=1&_startdoc=1&wchp=dGLbVtb-lSllz&_md5=3ec34f7c77e16ee3ed30d49ffa62fbea; and challenging alleged jail crowding (*see* Mize, Jeff, *Gridlock at Lockup*, The Columbian, Jan. 18, 1998, http://www.lexis.com/research/retrieve/frames?_m=cc9b7bebf86684bca0ae197898e9263a&csvc=fr&cform=free&_fmtstr=XCITE&docnum=1&_startdoc=1&wchp=dGLbVtb-lSllz&_md5=6ebf3087f57253538832412bcc0e3ad4). Although these might be worthy causes in many people's estimation, they are nevertheless *policy* pursuits that do not enjoy universal support. Forcing private property owners to pay for policy agendas—without regard for whether the property owners support or oppose the particular policy pursuits—is not just arguably a First Amendment violation, it is the very definition of government appropriation of the beneficial use of private property—i.e., a per se taking.

Indeed, not only are Petitioners themselves denied a say in how their property is used, but even the general public is deprived of a voice in appropriation of money seized by government. The program is accountable neither to the property's owners, nor even the voters whom government is suppose to serve and represent. *See* McMorris, Frances A., *Ruling May Undermine Programs That Fund Legal Services for Poor*, Wall St. J., Sept. 30, 1996, at B12 (noting comment of lawyer challenging constitutionality of IOLTAs that such programs "do an end-run around state legislatures").

This undermining of other rights that results from an initial undermining of property rights, illustrates a truth articulated by Justice Stewart:

> The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . [A] fundamental interdependence exists between the personal right to liberty and the personal right in property.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

Because the court below proposes a doctrine that would insulate obvious per se takings from per se analysis, this Court should reverse.

III

EVEN UNDER AD HOC REVIEW, IOLTA WORKS AN II LEGAL TAKING

This Court opined in *Tahoe-Sierra*, 122 S. Ct. at 1479, that it is "inappropriate" to apply a test from the sphere of regulatory takings to a categorical taking. But even if the IOLTA categorical taking was judged by the "essentially ad hoc, factual inquiries" articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), IOLTA still should be found to work a taking. The first of the three *Penn Central* factors—the "economic impact of the regulation on the claimant" (*Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986))—applies here in a straightforward manner. "Since the Court has already determined . . . that the client has a property interest in IOLTA generated interest, any 'taking' of that property would surely seem to have an economic impact on the client." Hrina, David J., *The Future of IOLTA: Has the Death Knell Been Sounded for Mandatory IOLTA Programs?*, 32 Akron L. Rev. 301, 321 (1999) (citation omitted). What of the counter argument that the amount a client might receive from a pooled trust account is speculative? This contention, whatever its merits, is defeated by the fact that *any* interest generated is recognized by this Court as belonging to the client; the possibility that the client might lack direct access to it shouldn't allow government to confiscate its use and disposition without reimbursement.

"Similarly, it would be difficult to assert that a client cannot satisfy the second of the *Penn Central* factors, that of a 'distinct investment backed expectation.'" *Id.* (citation omitted). Again, because this Court has declared that a client owns IOLTA-generated interest, this Court itself has created an investment-backed expectation that the client would not be deprived of use and disposition. *Id.* Surely any client who knows that money held in trust is capable of earning interest would expect that the interest be paid to him, or at least that it not be arbitrarily seized to support political or ideological groups with which he might not agree. *Id.*

Finally, *Penn Central*, 438 U.S. at 124, requires an analysis of the "character of the governmental action." Infringements are more commonly found to be takings under this prong when they "can be characterized as a physical invasion by government." *Id.* This fact is significant because, as noted above, *Webb's* analogized a taking very much like the one at bar in *Causby*, and *Causby* "is . . . a quintessential physical occupation case, a fact . . . later recognized in *Loretto*." Breemer, J. David, *IOLTA in the New Millenium: Slowly Sinking Under the Weight of the Takings Clause*, 23 U. Haw. L. Rev. 221, 240 (2000).

In any case, this Court has also found that "public program[s] adjusting the benefits and burdens of economic life to promote the common good" can "nonetheless effect a taking." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998). IOLTA confiscates a client's property to serve what government has determined to be broad social purposes promoted by legal service agencies. But the presumed benefit in this arrangement is outweighed by its conflict with a basic Fifth Amendment principle: government should be prevented "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). There is clear injustice in compelling a "dispersed political

minority" to shoulder such a broad public obligation. *See generally* Douglas, Kevin H., Note, *IOLTAS Unmasked: Legal Aid Programs' Funding Results in Taking of Client's Property*, 50 Vand. L. Rev. 1297, 1333 (1997) (accusing IOLTA programs of "quietly confiscating property from a dispersed political minority").

However inappropriate an ad hoc analysis might be in the context of the per se taking worked by IOLTA, even by ad hoc analysis, the seizure of IOLTA-generated interest should be seen as a taking. Therefore, this Court should reverse the ruling below.

CONCLUSION

Because the IOLTA program imposes a categorical taking that appropriates valuable core elements of the property right—principally dominion, use, disposition, and the right to exclude—Amicus respectfully requests this Court to grant Petitioners' request that the decision below be reversed.

DATED: August, 2002.

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SUPREME COURT U.S.
OCT 18 2002
OFFICE OF THE CLERK

No. 01-1325

IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ET AL.,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTEREST OF AMICI CURIAE[1]

AARP

AARP is a nonprofit membership organization of more than 35 million persons aged 50 and older dedicated to addressing the needs and interests of older Americans. In representing those interests, and to promote the social welfare, AARP seeks: (a) to enhance the quality of life for individuals as they grow older; (b) to promote independence, dignity, and purpose for such individuals; and (c) to improve the image of aging.

Older persons are substantial consumers of legal services. In recognition of the significant needs of our older population for legal services, and realizing that, as a practical matter, low-income older persons have nowhere else to turn for legal assistance, AARP has consistently supported public programs such as the Interest On Lawyers Trust Accounts (IOLTA) programs, which funds legal assistance providers that help many thousands of older persons every year. AARP advocates for adequate funding and support for legal assistance programs at the state level and in litigation nationwide. AARP Foundation – Litigation often serves as co-counsel with attorneys for IOLTA-funded programs.

There is every reason to believe that older persons' needs for legal assistance will increase in the future. The number of persons 60 years of age and older is growing, and the percentage of older persons in the total population is increasing as well. Because legal assistance is necessary when planning one's personal affairs, and is often required to obtain basic necessities such as health care, in-home support

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[1] In compliance with Rule 37.6 of this Court, amici curiae state that no counsel for any party authored this brief in whole or in part and that no person or entity, other than these amici curiae, their members or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

services, protective services, and benefits from programs such as Social Security, Supplemental Security Income (SSI), Medicare and Medicaid, the need for legal services for the elderly will rise along with the population increase. Moreover, the elderly comprise a population that is frequently the victim of fraudulent purveyors of goods and services. As the leading organization for older persons in this country, AARP has considerable interest in ensuring that older persons' needs for legal assistance are met.

LCE

Legal Counsel for the Elderly, Inc. (LCE), is a non-profit organization dedicated to providing legal services to low and moderate income older persons in the District of Columbia by training and educating others concerning the legal rights of older persons, and by testing methods of providing free and low cost legal and advocacy services to older persons. Each year, LCE also directly provides free and reduced fee legal services to over 7,000 residents of the District of Columbia, including residents of nursing homes and group homes.

LCE receives funding from a variety of sources including the District of Columbia Bar Foundation, which in turn receives most of its funds through the IOLTA program established by order of the District of Columbia Court of Appeals. LCE uses funds received from the D.C. Bar Foundation to provide low-income older people with legal assistance in the areas of protective services, guardianships, conservatorships, powers of attorney, and related matters for persons with diminished capacity. LCE is also involved with many other legal services providers that receive IOLTA funding, and LCE coordinates its activities and shares expertise with such legal services providers locally and nationally.

NLADA

The National Legal Aid and Defender Association (NLADA), established in 1911, is the largest national organization dedicated to ensuring access to justice for the poor

through the nation's civil legal aid and defender systems. Among NLADA's more than 2000 members are civil legal aid programs and legal services providers who are funded by IOLTA programs in all 50 States, the District of Columbia and the Virgin Islands, including amicus curiae LCE and programs funded by respondent Legal Foundation of Washington.[2] NLADA provides a broad range of technical assistance, communications, training, and advocacy to its members regarding IOLTA-supported programs.

In addition to IOLTA, NLADA members receive funding from a variety of other sources, including the Legal Services Corporation (LSC), the Department of Justice under the Violence Against Women Act, Title III funds from the Area Agencies on Aging under the Older Americans Act, funds from the Department of Housing and Urban Development, state appropriations or filing fee surcharges, local government funds, private contributions and foundation grants. In many instances IOLTA funds are used to leverage these other funding sources by providing required non-federal matches, or as general operating funds for which these other funds cannot be used.

Although funding from LSC is the largest single source of funding for civil legal assistance in the country, IOLTA is the second largest source of funds and in some parts of the country rivals LSC funding. Approximately 90 percent of IOLTA funds go to support programs, most of which are operated by members of NLADA, that provide civil legal services to the poor. Without IOLTA funding, the vast majority of NLADA's members would have to severely curtail their legal services to low-income Americans, and in many instances would have to shut their doors completely.

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[2] A complete list of organizations that received grants from the Legal Foundation of Washington in 2002 may be found at www.legalfoundation.org/2002/recipients.htm.

NLADA has accordingly supported IOLTA programs across the country, including Respondent Legal Foundation of Washington, and has worked with its members as well as with amici curiae National Association of IOLTA Programs and the American Bar Association to ensure the continuation and expansion of IOLTA programs because so many of its members depend on IOLTA funding for their support.

Brennan Center for Justice

The Brennan Center for Justice at New York University School of Law unites scholarship, public education, and legal action to find innovative and practical solutions to intractable problems in the areas of democracy, poverty, and criminal justice. Its interest in this case stems from its Access to Justice Project, which works to enable low-income individuals, families, and communities to effectively protect their legal rights. Focusing on eliminating barriers that interfere with the legal representation of low-income persons in civil matters, the Project conducts research, produces public education materials, promotes communication and coalition-building, provides legal counseling and engages in litigation on behalf of a broad network of legal services clients, advocates, and funders.

The Brennan Center appeared before this Court two years ago on behalf of legal aid lawyers and clients in *Legal Services Corp.* v. *Velazquez*. In that case, the Court noted that legal aid lawyers are often the only source of assistance for individuals whom the government has wrongly deprived of public benefits: "[t]here often will be no alternative source for the client to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits." 531 U.S. 533, 546 (2001).

The Brennan Center is participating in this case out of a belief that IOLTA programs provide an essential source of support for civil legal services, without which hundreds of thousands of low-income people annually would go without legal representation. Without this legal representation, legal

aid clients would be unjustly deprived of food, shelter and other essentials, would be unable to enforce the legal rights guaranteed to them by the Constitution and the laws of our nation, and would be unable to adequately participate in our system of justice.

SUMMARY OF ARGUMENT

Amici agree with respondents that Washington State's IOLTA program does not effect a governmental taking of private property for which just compensation is due. IOLTA exemplifies a creative regulatory program that, against the existing backdrop of banking regulations, deprives clients who seek professional services of nothing, while creating tremendous value for persons with legal needs and without resources to pay for legal assistance. Because the deposit of these funds in nominal amounts or for short terms is a voluntary action by persons seeking professional services, and because such persons could not otherwise expect to obtain returns on such funds, a state may exercise its regulatory authority in the public interest to create new value for the benefit of poor persons, without "compensating" those who would receive nothing of value in the absence of the program.

IOLTA serves the public interest. IOLTA-funded programs have achieved meaningful results for hundreds of thousands of Americans who, by virtue of such programs, have avoided eviction from the only housing available to them, obtained life-saving medical care, realized freedom from abusive spouses, relatives, and institutional caregivers, collected restitution from unscrupulous merchants, and received public services and benefits that enable them to purchase life's basic necessities. Without this source of funding, the citizens ably served by these programs would, in effect, be excluded altogether from participation in our justice system, and would consequently be deprived of any ability to obtain its protection.

ARGUMENT

Amici agree with and join the arguments presented in the briefs for Respondents, as well as in the amicus briefs of the Conference of Chief Justices and the American Bar Association, which demonstrate that IOLTA programs do not give rise to any claim for just compensation. We present, in Section II, several reasons why the multi-factored analysis of *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), compels a finding that the character of the government action in enacting IOLTA, when compared to the intangible and negligible interests asserted by Petitioners, requires a judgment that no compensation is due. Before we present these conclusions, we paint a fuller picture of the character of the State's action in enacting IOLTA, by documenting the unmet and growing need for legal services among low-income Americans and presenting compelling evidence of the success of service providers funded by IOLTA programs nationwide in meeting a significant number of those needs.

Anecdotal evidence provided in a survey of NLADA members[3] illustrates how IOLTA funding supplies essential services at the core of our system of justice—enforcing federal and state laws against wrongdoers who violate them; securing judicial orders that award custody or support payments or that restrain persons from exacting violence; enforcing contractual or public entitlements to medical care and other benefits; preventing government from wrongfully seizing or garnishing the property of private citizens; ensuring access to public accommodations for all persons; assuring that minor children are not wrongfully denied public education; preparing wills, guardianship papers, and medical powers of attorney; and providing other basic and critical services

[3] NLADA conducted a survey, *infra* at 13-14, the results of which it has presented in a Lodging Appendix ("Lodging App."), lodged with the Clerk and served upon the parties.

that are routinely available to persons who can afford to pay for them. The early and effective intervention that these legal aid programs can provide forestalls the much larger costs to society of leaving these needs unresolved.

The elimination of IOLTA programs would have drastic consequences for the fulfillment of this country's aspirations to provide a fair and open system of justice, and would produce no corresponding benefit—indeed, no benefit at all—to the Petitioners. Without the funds generated by IOLTA programs, thousands upon thousands of Americans will be left unable to navigate our system of justice. And, without IOLTA programs, the interest payments allegedly "taken" from Petitioners will not be returned to Petitioners for their use. They will simply disappear (as they did prior to the institution of IOLTA programs) into banks and lending institutions all over the country. Such a result contravenes the law and fundamental democratic notions of sound public policy as unanimously formulated in all fifty States and the District of Columbia.

I. IOLTA PROGRAMS PROVIDE MEANINGFUL ACCESS TO JUSTICE FOR THE POOR.

IOLTA programs similar to the Washington State program involved in this case[4] have been adopted by the highest courts or legislatures of all the States,[5] under their supervi-

[4] Although the Washington program involves real estate escrows as well as attorney trust funds, Petitioners agree that the difference is immaterial to the legal analysis. Pet. 15.

[5] Ala. R.P.C. 1.15(g); Alaska R.P.C. 1.15(d); Ariz. Sup. Ct. R. 44(c)(2); Ark. R.P.C. 1.15(d)(2); Cal. Bus. & Prof. Code § 6211(a); Colo. R.P.C. 1.15(e)(2); Conn. R.P.C. 1.15(d); Del. R.P.C. 1.15(h); D.C. R. Ct. App. B(a); Fla. Bar R. 5-1.1; Ga. Bar R. 1.15(II); Haw. Sup. Ct. R. 11; Idaho R.P.C. 1.15(d); Ill. R.P.C. 1.15(d); Ind. Prof. Cond. R. 1.15(d); Iowa C.P.R. DR 9-102; Kan. R.P.C. 1.15(d)(3); Ky. R.P.C. 1.15; La. R.P.C. 1.15(d); Me. C.P.R. 3.6(e)(4); Md. Bus. Occ. & Prof. Code Ann. § 10-303; Mass. R.P.C. 1.15; Mich. R.P.C. 1.15(d); Minn. R.P.C. 1.15(d); Miss. R.P.C. 1.15(d); Mo. R.P.C. 4-1.15; Mont. R.P.C. 1.18(b); Neb. Sup.

sory powers to regulate the legal profession, for the purpose of helping meet the enormous need for legal assistance that confronts low-income individuals, families and communities across the Nation. Endorsed by the Conference of Chief Justices and the American Bar Association, IOLTA programs are an essential part of our civil justice system and strive to achieve "Equal Justice Under Law," the laudable objective carved in stone over the entrance to this Court.

A. Vulnerable People Across The Nation Rely On IOLTA Programs.

Nearly 33 million people in this country live in households with a family income below the poverty level.[6] Numerous States, professional associations, and academics have conducted surveys within the last decade to assess the number and kind of legal needs that exist among low to moderate income communities, the extent to which these legal needs remain without redress, and the manner in which these needs are met. These studies have consistently shown that between 70 and 90 percent of this population cannot obtain legal services to resolve the most pressing legal problems, even when services provided through existing public and private funding

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Ct. R. Trust Accts.; Nev. Sup. Ct. R. 217; *In re New Hampshire Bar Ass'n*, 453 A.2d 1258 (N.H. 1982); N.J. R. Gen. App. 1:28A-2; N.M. R.P.C. 16-115(D); N.Y. Jud. Law § 497; N.C. Admin. Code tit. 27, rr. 1D.1301-.1316; N.D. R.P.C. 1.15(d)(1); Ohio Rev. Code Ann. § 4705.09(A)(1); Okla. R.P.C. 1.15(d); Ore. C.P.R. DR 9-101(D)(2); Pa. R.P.C. 1.15(d); R.I. R.P.C. 1.15(d); S.C. App. Ct. R. 412; S.D. R.P.C. 1.15(d)(4); Tenn. C.P.R. DR 9-102(C)(2); Tex. R.P.C. 1.14; *In re Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); Va. Sup. Ct. 6:2-1.15; Wash. R.P.C. 1.14; W. Va. R.P.C. 1.15(d); Wis. Sup. Ct. R. 20:1.15; Wyo. R.P.C. 1.15. All state statutory authority current as available on Westlaw.

[6] U.S. Census Bureau, *Poverty in the United States: 2001*, *available at* http://www.census.gov/hhes/poverty/poverty01.

sources (including IOLTA) are accounted for.[7] The most recent studies tend to place the level of unmet need at the high end of this spectrum, in contrast to earlier studies that were performed or based upon data collected before a 30 percent cut in funding that Congress imposed on the Legal Services Corporation ("LSC") in 1996, and before lower interest rates and higher administrative fees decreased IOLTA funds in the last several years.

One recent study evaluated legal needs of 100,000 persons living at or below the poverty level in the District of Columbia.[8] Building upon the methodology and analysis em-

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[7] *See, e.g.*, Lynn E. Cunningham, *Legal Needs for the Low Income Population In Washington D.C.*, 5 U.D.C. L. Rev. 21, 58 (2000) (ninety percent of legal needs are not being met for households living in low income households); Richard C. Baldwin, *Needs and Deeds*, Oregon State Bar Bulletin 11 (Dec. 2000), *available at* www.osbar.org/2practice/bulletin/00dec/feature.htm (last visited October 16, 2002) ("low income Oregonians were able to obtain the services of an attorney only 18.2 percent of the time"); Mark D. Killian, *Study: Legal Needs Going Unmet*, Florida Bar News (Mar. 15, 1995), *available at* http://www.afn.org/~afn54735/legalneeds1.html (last visited Oct. 16, 2002) (in 1993 to early 1994, 70 percent of low and moderate income households in Florida had no access to the legal system); American Bar Association, *Findings of the Comprehensive Legal Needs Study Conducted by the Institute for Survey Research at Temple University for the Consortium on Legal Services and the Public* (1994) (approximately 80% of legal needs of low-income population unmet); Questions and Answers About the Dallas Volunteer Attorney Program, *at* www.lsnt.org/nav/volist.asp (last visited Oct. 16, 2002) (in 1991, almost 70% of the legal needs of poor Texans go unmet every year); United Way/Community Service Council of Central Indiana, *Legal Needs Study of the Poor in Indiana* (Feb. 1992) (reporting that as of 1988, less than 10% of legal needs of the poor were being met); The Spangenberg Group, Inc., *An Assessment of the Unmet Civil Legal Needs of Ohio's Poor* ("The Spangenberg Report") (Sept. 1991), *available at* www.olaf.org/aboutolaf/ourpublications/spangenburg (last visited Oct. 16, 2002) (between July 1989 and July 1990, 83% of legal problems among low-income households in Ohio went without legal help).

[8] Cunningham, *supra*, 5 U.D.C. L. Rev. at 24.

ployed in studies conducted by the ABA in 1994 and various state commissions, the D.C. study identified 206,622 legal needs in the District of Columbia for which a low-income person stood "a reasonable chance" of obtaining an improved position with professional legal assistance.[9] After documenting that only about 21,000 of those needs were, in fact, addressed by all provider resources, the study concluded that 90 percent of legal needs of low-income persons in the District of Columbia were left unmet.[10]

Many of the studies conducted in the last ten years also identify key areas in which the poor most need legal services. Access to safe, affordable housing and health care, disputes over utility service, domestic violence, the need to obtain divorce, custody, and child support, juvenile justice issues, consumer problems, and difficulty interacting with government agencies all rank among self-reported legal issues facing low-income communities in great numbers.[11] The problem of access to justice is particularly acute for rural, elderly, and disabled populations that lack the ability to travel to remote legal services centers. Although many low-income persons do not seek legal assistance for these legitimate problems due to a perception that legal services are unaffordable, or to a lack of knowledge about how to find an available attorney,[12] studies show that civil legal aid lawyers often lack

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[9] *Id.* at 57

[10] *Id.* at 59.

[11] *See, e.g., Legal Needs Study of the Poor in Indiana, supra,* at 15-20; Cunningham, *supra,* 5 U.D.C. L. Rev. at 26-51.

[12] *See Legal Needs Study of the Poor In Indiana, supra,* at 13 ("about 14% of those interviewed indicated they were aware of or have ever used . . . an organization that provides free legal assistance"); ABA National Conference on Access to Justice in the 1990s, *Civil Justice: An Agenda For The 1990s* (June 9-11, 1989), *available at* http://www.abanet.org/legalservices/downloads/sclaid/access.conf.pdf (last visited Oct. 16, 2002); The Spangenberg Report at 5 (fifteen percent of those surveyed did not know whether free services were available for their legal problems).

sufficient resources to provide needed legal assistance to those who do seek help.[13]

B. The Substantial Contribution Of IOLTA.

1. IOLTA Programs Rank Among The Largest Sources Of Funding Of Legal Services For The Poor.

According to a report by the ABA's Commission on IOLTA, the total income raised in 2001 by IOLTA programs nationwide (excluding North Dakota, South Dakota and Utah, for which information was unavailable) was $205,024,935.[14] A sampling of reports from individual

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[13] *See, e.g.,* Legal Services Corporation, *Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress* 13 (Apr. 30, 2000), *available at* http://www.lsc.gov/pressr/EXSUM.pdf. (last visited Oct. 16, 2002) ("A survey of selected programs in the spring of 1993, when LSC funding was substantially higher than it is today, revealed that nearly half of all people who applied for [legal] assistance from local programs were turned away because of a lack of program resources"); Baldwin, *supra* (in Oregon, "[t]wo out of three clients eligible for services under federal poverty guidelines were turned away by legal services offices due to scarce resources" and "two out of three clients served by those offices obtained only minimal service (*e.g.* brief advice or a brochure) due to scarce resources"); The Spangenberg Report at 6 (in 1989, prior to additional federal funding reductions that occurred in the 1990s, a majority of LSC funded staff programs had to limit intake to only emergencies).

[14] American Bar Association Commission of Interest on Lawyers' Trust Accounts, *IOLTA Handbook* 98, 208 (Jan. 1995, updated July 2002). It is important to understand that the total income earned by IOLTA programs in 2001 reflects more than just the $162,243,664 of interest earned on IOLTA accounts—it also tabulates investment income that is returned on interest income, as well as court filing fees administered by IOLTA programs. *Id.* at 98. IOLTA program administrators thus have the ability to retain reserves and manage interest proceeds in a manner that maximizes returns and provides additional value to the ultimate beneficiaries of services provided by IOLTA grantees.

States indicates grant levels in a cross-section of rural, urban, small and large population states:

Year Reporting	State	Total IOLTA Grants Awarded
FY 2002	Alaska	$344,000[15]
FY 2002	Arizona	$948,500[16]
FY 2001	Colorado	$1,056,881[17]
2001	Florida	$10,500,000[18]
2002	Idaho	$230,000[19]
2001	Indiana	$300,000[20]
FY 2002	Kentucky	$700,000[21]
FY 2003	Massachusetts	$7,816,115[22]
2001	Michigan	$1,478,570[23]
FY 2003	Minnesota	$1,749,600[24]

[15] Alaska Bar Association website, www.alaskabar.org/ index.cfm?id=5268 (last visited Oct. 16, 2002).

[16] Arizona Bar Foundation website, www.azbf.org/AZFLSE/legalservices/ioltagrants.cfm (last visited Oct. 16, 2002).

[17] Colorado Lawyer Trust Account Foundation website, www.coltaf.org/current_grantees.htm (last visited Oct. 16, 2002).

[18] The Florida Bar Foundation, *An Overview of the IOTA Legal Assistance for the Poor Program 2001*, Lodging App. 196.

[19] The Idaho Law Foundation website, www2.state.id.us/isb/pub_info/iolta_grants.htm (last visited October 16, 2002).

[20] Indiana Bar Foundation, *Annual Report 2001*, *available at* www.inbar.org/ content/news/article.asp?art=64 (last visited Oct. 16, 2002).

[21] Kentucky Bar Association website, www.kybar.org/KBF_IOLTA/iolta_grant_history.htm (last visited Oct. 16, 2002).

[22] Massachusetts Legal Assistance Corp. Response, Lodging App. 468.

[23] Report of the Michigan State Bar Foundation (2002), Lodging App. 284.

FY 2002	New Hampshire	$1,286,410[25]
2000	New York	$10,780,000[26]
2002	Texas	$4,166,667[27]

The relative impact of IOLTA on access to justice can be measured by comparing IOLTA funding to the funding awarded by the LSC—the largest federal program offering direct financial assistance for legal services to the poor. In 2001, IOLTA programs provided approximately $146,882,369 toward legal services for the poor,[28] about one-half of the funding appropriated for LSC grants ($310,000,000) in that period.[29]

2. IOLTA Funds Help Thousands of Low-Income Individuals And Families.

This brief presents information obtained by NLADA in a survey of members initiated on July 22, 2002.[30] The re-

[24] Report of the Minnesota State Bar Association, Lodging App. 120.

[25] New Hampshire Bar Association website, www.nhbar.org/ site-map.asp (last visited Oct. 16, 2002).

[26] The IOLA Fund of the State of New York website, www.iola.org (last visited Oct. 16, 2002).

[27] Texas Equal Access To Justice Foundation website, www.txiolta.org/grantees.html (last visited Oct. 16, 2002).

[28] *IOLTA Handbook*, *supra*, at 208.

[29] *See* Pub. L. No. 106-553, 114 Stat. 2762 (2000). The LSC reported that, in 1999, IOLTA was the third largest donor of funds to recipients of LSC grants, behind the LSC and state/local governments, providing 11.3% of total funding for LSC grantees. LSC, *Serving the Civil Legal Needs of Low-Income Americans*, *supra*. Such percentage does not reflect the amount of IOLTA funds granted to legal services providers that do not also receive LSC funds.

[30] The survey request is reproduced in full at Appendix A to this brief. In sum, NLADA asked for information regarding: (1) the amount of IOLTA funding each member received; (2) the number of employees this amount supported; (3) the number of cases/matters it attributed to

sponses illustrate the central importance of IOLTA funds, which enabled survey respondents to provide legal services well in excess of 176,297 cases annually.[31]

Some IOLTA funds are used for general purposes, such as training for staff and volunteer personnel, technical assistance, community and public education, group advocacy, and providing self-help information by such means as seminars, clinics, and brochures. Other IOLTA funds support direct legal representation of individuals in matters essential to their personal, physical and financial well-being, involving issues in many legal fields. The overwhelming majority of matters center on family law, protection from domestic violence, housing issues, public benefits and income maintenance, and consumer protection. Other areas include abuse of the elderly, juvenile proceedings, protection of family farms, and rights of the institutionalized or disabled. We provide below a few illustrative examples of cases and successful outcomes made possible by IOLTA funding.

Helping Vulnerable People Cope with Medical Crises. Legal aid providers rely on IOLTA funding to obtain critical medical care or sustaining income during a medical crisis. In one example, a nurse's aide in her mid-30s with a three-year-old son was diagnosed with advanced breast cancer. For one year, debilitating treatments prevented her from working and

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IOLTA funding; (4) a breakdown of these cases/matters by types; (5) delivery initiatives that contribute to the administration of justice/access issues supported by IOLTA funding in its program/state; (6) a short narrative of how IOLTA contributes to the provision of legal services to poor people in its program/state; (7) anecdotal examples describing particular legal services that were made possible by IOLTA funding.

[31] Eighty-five programs in 33 States responded to the survey, reporting receipt of a combined total of $53,988,038 in annual IOLTA grants—approximately 37% of the total grants awarded by IOLTA programs nationwide. A list of the responding organizations is attached at Appendix B. Copies of the full responses have been lodged with the Clerk and sent to counsel for the parties.

dissipated her savings. When she was wrongfully denied SSI benefits, the Community Legal Aid Society of Delaware amassed convincing evidence of her disability and persuaded an administrative law judge to award her desperately needed benefits on the spot. Lodging App. 458-59.

Likewise, the Tennessee Justice Center ("TJC") helped save a 13-year-old boy who was dying of respiratory complications. His family became lost in administrative red tape when, although all medical personnel agreed that his condition required emergency surgery, the managed care company refused to pay. The TJC persuaded state officials to direct payment for the procedure, and the boy is successfully recovering. Lodging App. 66.

Helping Tenants Threatened with Unjustified Eviction. The New Haven Legal Assistance Center prevented the eviction of a single mother with multiple sclerosis and her four children from an apartment, when the landlord instituted proceedings to evict her for non-payment of rent, despite proof of payment. Lodging App. at 61. Likewise, the Community Legal Aid Society of Delaware stopped the victimization of, and obtained alternative housing for, another woman with children, when her refusal of her landlord's unwanted demand for sexual favors prompted him to turn off her utilities in the middle of winter. Lodging App. 457-58.

Supporting Family Farms and Ranches. IOLTA funds programs that assist rural farmers and ranchers with the myriad legal and financial issues that plague small landowners coping with drought, water restrictions, natural disasters, and the everyday hardships of small farming operations. For instance, Nebraska Legal Services operates a Farm Mediation Service, which offers farm borrowers and lenders the guidance of highly skilled impartial mediators to resolve disputes as an effective, confidential alternative to bankruptcy and foreclosure. Lodging App. 533-34.

Protecting Children and Families. A working mother suffered cruel physical and emotional abuse at the hands of

her unemployed husband. As a result, her child refused to speak. The Jacksonville Area Legal Aid Clinic successfully challenged the father's court-ordered custodial status (which he had obtained by threatening violence), secured an injunction requiring supervision of the father's visits, and is assisting the mother in divorce proceedings. Removed from the violent environment, the child now speaks articulately.

Legal aid programs are instrumental in enforcing court orders of child support against parents who seek to avoid such legal obligations, or obtaining such support in legally complicated situations. The Georgia Law Center for the Homeless (GLCH) established the paternity of a deceased father who had supported his child while he was alive, and obtained Social Security survivor benefits for the child. The child's mother could not have accomplished this alone: the Law Center convinced a state agency to preserve the only DNA evidence available to establish paternity. Lodging App. 58.

Protecting the Elderly. Legal aid programs funded by IOLTA protect elderly persons in a variety of ways. Around the country, they bring consumer protection actions against fraudulent salespersons who convince elderly homeowners with a great deal of equity in their homes to purchase overpriced and unnecessary repairs and to sign usurious or otherwise disadvantageous refinancing agreements, enabling the salesperson to abscond with the remaining equity when foreclosure becomes necessary. Lodging App. 459-60, 364.

Safeguarding the physical well-being of the elderly, the Atlanta Legal Aid Society intervened to protect a woman in a licensed personal care home who was injured, malnourished and dehydrated due to neglect. Consequently, the woman obtained medical care and placement in an appropriate nursing facility. The proven neglect by the licensed home provider caused the loss of its permit to operate. Lodging App. 115.

Helping Individuals Contend with Bureaucratic Error. Sometimes IOLTA-funded lawyers resolve bureaucratic errors in government or large companies that nonlawyers cannot themselves untangle. For two hardworking, low-income clients, Legal Services of Greater Miami obtained a $7,280 tax refund, which the IRS had wrongfully refused to provide. Lodging App. 224-25. A pro bono volunteer recruited by Legal Services of Eastern Michigan spent two years clearing the bad credit record of a woman whose record erroneously reflected that she was in default on thousands of dollars of student loans that she had never applied for or received. Lodging App. 315. New Hampshire Legal Assistance (NHLA) obtained unemployment compensation for a working mother simultaneously employed full-time in a factory and part-time at Wal-Mart. After poor health forced her to relinquish her part-time job, she lost the other when the factory closed. NHLA persuaded a state agency on appeal that voluntary termination from a part-time job does not disqualify a claimant from unemployment benefits in New Hampshire when the claimant is subsequently laid off from a full-time job. Lodging App. 147.

These legal services programs are not just helping individuals—they are saving society the much higher costs it would incur were legal services not provided. By facilitating custody orders that place orphaned or neglected children with grandparents, IOLTA programs save the State from the short-term costs of supporting a child in the foster care program, and the longer-term costs of addressing the emotional and other difficulties that often arise when a child is displaced from his family environment. Lodging App. 207. IOLTA-funded advocacy often provides Medicaid patients with less-expensive care or benefits that enable the patients' caretakers to continue working and contribute to a productive society. *See, e.g.*, Lodging App. 502 (obtaining release of 8-year-old boy from residential treatment facility, allowing him to live at home with appropriate community based health services); Lodging App. 460-62 (single mother working part-time and

attending nursing school able to keep working and earning degree because daughter with cerebral palsy was provided with nursing services through Medicaid).

The foregoing provides a glimpse into the many success stories contained in the survey responses lodged with the Clerk. In example after example, IOLTA funding serves the public good by helping people who are in desperate need, and whose cases would be hopeless without IOLTA programs to provide access to justice. With this impressive showing of IOLTA's service for the public good, it is preposterous for Petitioners to assert (Br. 30) that "no combination of government interests, or other surrounding facts and circumstances can possibly provide a basis for sustaining" IOLTA—an assertion that is also flatly inconsistent with Petitioner's acknowledgment (Br. 21) that IOLTA programs support a "laudable public goal—the funding of legal services for those unable to afford them."

3. IOLTA Subsidizes Delivery Models Uniquely Suited To Serving The Poor.

In addition to delivering traditional litigation and transactional legal services, legal services providers also utilize IOLTA funds to develop alternative models for meeting legal needs tailored to the population they serve. For instance, IOLTA funds enable remote or incapacitated populations to obtain legal help through telephone hotlines or satellite intake centers in rural areas. IOLTA grantees offer public education efforts at such venues as senior citizen centers, domestic violence shelters, mental health facilities, homeless shelters, AIDS clinics, substance abuse clinics, and refugee centers.

IOLTA funds are also used, for example, to teach the poor to help themselves more effectively. IOLTA funds support clinics designed to assist low-income persons in performing basic legal tasks, such as filling out administrative forms, obtaining no-contest divorces, or filing for bankruptcy, on their own. Some providers use IOLTA funds to implement new technologies for outreach and pro se assistance—for example, by placing forms and informational guides on a website.

IOLTA also helps leverage the resources of the private bar. Legal services providers can effectively meet some of the unmet needs of the poor by recruiting private attorneys willing and eager to contribute pro bono service to worthy causes. For instance, the Florida Bar Foundation, which operates Florida's IOLTA program, reported that it was able to leverage $14.2 million in donated services from volunteer lawyers. Lodging App. 198. Once IOLTA-funded public service providers assist pro bono attorneys in identifying particular individuals needing services, IOLTA makes pro bono assistance more effective by funding training sessions in specialized area of poverty law for attorney volunteers who may be accustomed to dealing with the very different problems of businesses and wealthy individuals. Without the funds to cover administrative costs of this outreach and training, much of the energy and enthusiasm generated by the private bar for pro bono work would be wasted due to the lack of an efficient clearinghouse to refer those who need services to those who are willing to provide them.

IOLTA also supports alternative dispute resolution mechanisms to be used to alleviate some of the burden on courts and agencies. For instance, some NLADA members have established mediation programs, in which low income persons may mediate custody and other contentious disputes with the goal of minimizing or eliminating the need for agency or court intervention. Lodging App. 60, 138.

4. The Particular Importance Of IOLTA As Compared To Other Funding Sources.

Every recipient of IOLTA funds described that support as critical to operations that would otherwise have to be eliminated or severely curtailed. *See, e.g.*, Lodging App. 105. Especially for small and rural providers, which are largely ignored by foundations and large corporate donors,

Lodging App. 512-14, IOLTA constitutes the "backbone" of legal assistance operations. Lodging App. 176.

Two vital characteristics of IOLTA make the programs especially important to service providers. *First*, IOLTA funds provide a platform to leverage other funding sources. Service providers can pursue matching funds from various charitable foundations and corporate donors, or use IOLTA to establish the administrative structure to build and sustain specialized projects that capture the interest of private donors. The imprimatur placed upon a service provider whose grant application has been screened and accepted by an IOLTA grant committee gives comfort to other charities with funds to allocate that the grantee is serving a needy community well.

Second, IOLTA funds support essential services that cannot be funded through other public or private grants, because grants are often earmarked for certain uses only. *See* Lodging App. 44. Whereas corporate grants sometimes do not permit *any* application of funds to "overhead" or "administrative costs," IOLTA funds pay lawyers and staff required to supply basic legal services and programs. They can be allocated to the highest and best use within a particular community to fill necessary gaps in coverage for persons in need. As one NLADA member put it, IOLTA "allows us to support the 'bread and butter work' like evictions or regular divorces, not supported by funds targeted for whatever the new cause of the day is." Lodging App. 114.

C. Without IOLTA, Alternative Sources Of Funding Will Be Inadequate To Meet The Legal Needs Of The Elderly And Poor.

IOLTA funding cannot realistically be replaced by other sources. Private donations to legal aid organizations are especially vulnerable to economic downturns. Despite increases in the number of people with incomes under the poverty line, LSC funding has remained essentially static for

several years and substantial increases are not anticipated in the near future.

1. Client Needs Cannot Be Met By Private Donations Alone.

Studies of Americans' charitable giving patterns demonstrate that relying on private donations as a source of legal services funding is an inherently unsustainable proposition. Organizations that provide legal services to the poor and elderly are the most susceptible to cycles in the economy, as well as to events of national and global scale that "crowd out" charitable giving to organizations such as legal aid providers whose mission is not directly related to those events. In Connecticut, for example, IOLTA funds comprised more than half the funding for legal aid organizations across the state in 2001, and "[i]t is clear that the needs of the program . . . cannot be raised by voluntary contributions, nor can volunteerism fill the gap."[32]

Like many other social services agencies, legal services groups suffer when national and world events prompt Americans to rethink their charitable giving. Historically, national giving patterns are "strongly driven by changes in the economy"; while national giving typically rises by 4 percent in non-recessionary years, that rate historically falls at an inflation-adjusted rate of 1 percent in recessionary years.[33] And when charitable giving does wane, it has a much greater impact on groups like legal services organizations; while well-established recipients such as large universities and nationally recognized charities tend not to be affected greatly by economic fluctuations, small, "grass-roots organizations that

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[32] *Legal Services Needs Immediate Support*, Conn. L. Trib., June 10, 2002, at 23.

[33] The Center on Philanthropy at Indiana University, *Philanthropic Giving Index* 6 (Summer 2002).

strive to help the poor"[34] and "that need the cash the most"[35] are disproportionately affected. Moreover, service-oriented charitable organizations, such as legal aid groups, experience higher-than-average price elasticity than do charities as a whole, meaning that those groups are more greatly affected by changes in their donors' respective financial situations.[36]

Similar fluctuations in charitable giving historically occur when "newsworthy" events of national and global scale prompt Americans to give to a particular cause in large numbers. In the aftermath of the September 11 attacks, for instance, Americans' generous giving to large relief organizations such as the American Red Cross and the September 11 Fund had the "unpleasant side effect" of reducing contributions to smaller relief organizations "noticeably."[37] This phenomenon has been felt directly by legal services organizations that receive most of their private donations from law firms. Following September 11, legal services organizations in New York and Washington, D.C. have described a "diversion problem": funds spent by law firms to help victims of the tragedies have in some cases been made in lieu of, rather than in addition to, their regular donations to legal aid causes.[38]

Given the inherent volatility of private contributions to legal services organizations, it is not likely that those organi-

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[34] Aline Sullivan, *The Heart Is Willing, But the Economy Isn't*, Barron's, Dec. 17, 2001, at 23.

[35] Lisa Gubernick, *Giving: The Big Charity Chill*, Wall St. J., Dec. 1, 2000, at W1.

[36] Robert McClelland & Mary F. Kokoski, *Econometric Issues in the Analysis of Charitable Giving*, 22 Pub. Fin. Q. 498, 513 (1994).

[37] MacKenzie Carpenter, *Some Charities See Drop in Giving This Year*, Pitt. Post-Gazette, Dec. 24, 2001, at A1.

[38] Andrew Longstreth, *Charity: Double Dipping*, Am. Lawyer, Dec. 2001, at 25.

zations would be able to make up the shortfall from other sources of funding if IOLTA programs were to be terminated. Important supplements to IOLTA other than private donations, such as raising court costs to litigants,[39] using funds escheated to the state under the *cy pres* doctrine,[40] or instituting statewide mandatory pro bono programs,[41] have not been universally implemented and, even if they were, could not generate nearly enough funding to meet the needs that are presently met by IOLTA.

2. Legal Services Without IOLTA: The Indiana Example.

For real-world evidence underscoring these concerns, one need only look to the recent history of legal services in Indiana, which in 1998 became the 50th State to adopt a statewide IOLTA program. Under the pre-IOLTA regime, legal aid to the poor was, by any reasonable measure, woefully inadequate. A survey conducted in 1992 by the United Way/Community Service Council of Central Indiana found that less than 10 percent of the potential legal problems of Indiana's poor were being met,[42] and that "a critical funding shortage severely restricts the availability of civil legal assistance to Indiana's poorest citizens,"[43] particularly those living in the rural half of the State, where legal aid organiza-

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[39] William C. Lhotka, *Raising Court Fees Will Help Aid for Poor, Advocates Say*, St. Louis Post-Dispatch, Apr. 8, 2002, at B1.

[40] *See* Brad Seligman & Jocelyn Larkin, *Fluid Recovery and Cy Pres: A Funding Source for Legal Services*, *available at* http://www.impactfund.org/CyPres2000FED.html (last visited Oct. 16, 2002).

[41] George Schatzki, *The Survival of Legal Services for the Poor in Connecticut*, 70 Conn. B.J. 313, 322 (1996).

[42] *Legal Needs Study of the Poor in Indiana*, *supra*, at 73.

[43] *Id.* at 81.

tions were practically nonexistent.[44] The report noted that federal funding accounted for more than 75 percent of all legal services funding in the state, and that "[p]rivate dollars, along with state and local government spending, were not able to make up the deficit."[45] Moreover, for those fortunate enough to receive any legal assistance, the quality of service rendered was often insufficient; about 60 percent of all LSC cases received only limited forms of representation, such as referrals, counsel and advice—at a time when LSC funding was much greater than it is today.[46] The report's first conclusion was that, in order to improve legal services in Indiana, "a comprehensive IOLTA program" must be created and implemented.[47]

Indiana's IOLTA program did not begin making grants to legal services organizations until March 2001.[48] The state program used the funds initially to provide start-up and administrative funds for pro bono programs involving lawyers from the local bar associations.[49] Based exclusively on IOLTA funding of over $1 million, the Indiana Pro Bono Commission was created to help address the legal services needs of Indiana citizens.[50] As a result, that Commission noted that "the number of people working towards developing pro bono resources [in Indiana] [has] increased exponentially"—a trend that, in the Commission's view, "should bring a tangible difference in the lives of many of the under-

[44] *Id.* at xvii.

[45] *Id.* at xvi.

[46] *Id.* at xvii.

[47] *Id.* at xix.

[48] *Grant To Fund Free Legal Services*, South Bend Trib., Mar. 14, 2001, at D2.

[49] *Id.*

[50] *See* About the Pro Bono Commission, *available at* http://www.in.gov/judiciary/probono/about.html (last visited Oct. 16, 2002).

served population in Indiana."[51] With IOLTA, the Indiana Bar Foundation has observed that "[t]he outlook for the future is optimistic."[52] If IOLTA programs in Indiana and elsewhere were to be abolished, the prognosis for legal services would undoubtedly darken significantly.

D. The Dangers Of Leaving Substantial Populations Without Access To Justice.

Leaving a substantial segment of society without proper access to the justice system would have an enormous impact on the individuals whose needs are not addressed. A lack of legal assistance can leave poor people homeless, victims of unscrupulous vendors, without necessary medical care, subject to domestic violence, facing the loss of the family farm, or helpless in the face of otherwise intractable legal problems. In addition, it produces deleterious effects beyond the mere fact that persons who are wronged receive no redress. *First*, persons who cannot afford to hire a competent attorney to address a legal problem may engage in inadequate self-help or consult incompetent non-lawyers and exacerbate their problems. Either of these options imposes significant costs upon administrative agencies and court staffs in responding to them. By providing access to legal professionals who can advise clients when claims lack merit and, for meritorious claims, steer the client to the appropriate avenue for redress, adequately funded legal services programs have the potential to facilitate the administration of justice.

Second, legal need studies report that persons who obtain the assistance of a legal professional for a particular problem

[51] *See* Indiana Pro Bono Commission, *2000 Annual Pro Bono Report and Plan*, *available at* http://www.courts.state.ny.us/pbconvocation/indianapbcommrpt.pdf (last visited Oct. 16, 2002).

[52] *See* Indiana Bar Foundation, *2001 Annual Report*, *available at* http://www.state.in.us/judiciary/probono/attorneys/reports (last visited Oct. 16, 2002).

are more likely to be satisfied with the response to that need—even if the client has not obtained a favorable outcome. Baldwin, *Needs and Deeds* at 2. Those left without representation form negative opinions about the legal system generally. *Id.* Naturally, persons who remain at the fringes of our legal system or who harbor negative opinions about the legal system generally will be far less likely to know, respect and believe in the law and those who enforce it.

II. THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT PROVIDES NO REMEDY TO PETITIONERS.

Although we do not undertake to present the full legal analysis that has been supplied by Respondents and several amici, we do point out a few features of the Washington program and this case that make it inescapably clear, under this Court's decision in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), that Washington's IOLTA program takes no property of the Petitioners for which any compensation is due.

First, Petitioners' attempt to avoid application of *Penn Central* altogether should be rejected. Petitioners' disingenuous statements that IOLTA "involves no regulatory purpose of any sort" (Br. 15) and "is not about regulation of private conduct or exercise of the State's police powers . . ." (*id.* at 22-23) belie reality and their own admissions. Petitioners correctly framed the question presented in this case as one involving a "regulatory scheme for funding state legal services." *See* Pet. i. IOLTA programs lie within the core of regulatory authority—by imposing conditions and limitations on the everyday conduct of persons licensed by the government to practice in the legal and banking professions. It cannot be questioned that IOLTA programs "adjust[] the benefits and burdens of economic life to promote the common good," *Penn Central*, 438 U.S. at 124. The enormous degree to which the IOLTA programs succeed in promoting the common good, when compared to the intangible and non-

quantifiable alleged interference with Petitioners' property, necessarily dictates the conclusion that no compensable taking has occurred here.

Second, Petitioners have overlooked a critical aspect of the Washington program that refutes their contention that state action deprived them of property. Although Washington's IOLTA program is mandatory for lawyers (and other licensed professionals), the same cannot be said for clients. In addition to the obvious fact that a client's decision to entrust funds to a lawyer or real estate professional for the purpose of obtaining legal services or effecting a legal transaction is a completely voluntary decision with no state involvement or coercion, any client may also withdraw funds placed with an attorney at any time upon demand. *See* Wash. R.P.C. 1.14(b)(4) ("A lawyer shall . . . [p]romptly pay or deliver to the client as requested by a client the funds . . . in the possession of the lawyer which the client is entitled to receive.") Moreover, a client can freely choose *not* to subject his or her funds to deposit in an IOLTA account, simply by supplying funds to a lawyer in a sufficient amount or for a sufficient time as to be capable of earning net interest, which in Washington would then require the establishment of an interest bearing account with proceeds payable to the client. *See* Wash. R.P.C. 1.14(c)(2). Thus, Petitioners simply have no credible argument that Washington has in any way deprived them of the power to earn interest or to exclude others from earning interest on principal owned by them.

Third, although Petitioners attempt to characterize IOLTA programs as takings that rob from Peter to pay Paul, Peter is nowhere to be found in this litigation. Prior to the institution of IOLTA programs, banking institutions retained all benefits associated with the income-generating power of nominal or short term deposits. If IOLTA were held to be invalid, the millions upon millions of dollars generated by IOLTA programs would not become available for Petitioners. Rather, lawyers would place these nominal or short term funds, as they had in the past, into trust accounts payable on

demand as required by rules of professional conduct, *see, e.g.*, Wash. R.P.C. 1.14(a) & (c), which by virtue of bank and administrative costs could not earn interest for the client. Thus, banks are the *only* parties who might be in a position to complain about having, as a result of IOLTA, lost the opportunity to accrue wealth that had previously existed. Petitioners simply possessed no "investment backed expectations," as anticipated by *Penn Central*, that the State of Washington has taken, or could take, away.

Petitioner Washington Legal Foundation has, in fundraising letters to finance this litigation, made clear that this case is not at all about property it believes has been taken away from it or its members. Its solicitation for funds makes Petitioners' real purpose plain—to "deal a death blow to the single most important source of income for radical legal groups all across the country." *See* Fundraising letter from Washington Legal Foundation dated September 4, 2002 (App. 9a). As this brief and the materials lodged in support herewith make plain, this is a gross mischaracterization of the nature of IOLTA-funded legal services programs. These programs provide essential legal services to American citizens who cannot afford to pay for them and who, without such services, live in desperate circumstances. What Petitioners oppose is not the disruption of their own investment-backed expectations, but rather IOLTA's use of interest "to support programs [they] oppose," but which duly elected and appointed state legislatures and courts throughout the country strongly support. Petitioners' effort to distort the Just Compensation Clause merely to suit their political agenda must not be countenanced.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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OCTOBER 2002

APPENDIX A

[Logo]
National Legal Aid Defenders Association
1625 K Street, N.W., Suite 800
Washington, D.C. 20006-1604
T: 202.452.0620
F: 202.872.1031
www.nlada.org

MEMORANDUM

To: Recipients of IOLTA Funds Providing Legal Services to the Poor and Access to Justice Coordinators

From: Don Saunders, Director of Civil Legal Services, NLADA

Re: Important Information Request for *Amicus Curiae* Brief Before the United States Supreme Court

Date: July 22, 2002

NLADA is committed to supporting in every possible way the advocacy effort before the Supreme Court this fall in the IOLTA litigation from the Ninth Circuit, *Washington Legal Foundation v. Legal Foundation of Washington*. We are working closely with counsel in the case and are preparing an *amicus* brief to support and amplify upon important issues in the Legal Foundation of Washington's arguments to the Court. Our brief will focus on the importance of IOLTA funding to the administration of justice, particularly stressing access issues as they relate to the program provider and client community.

To make this point, we need to gather as much information from the provider community as possible — information that will allow us to paint a compelling picture of the importance of this funding source to the administration of justice in the 50 states and territories. **WE NEED YOUR HELP** in gathering this information, as you are the ones who make ac-

cess to justice a reality for the people you serve. The more information we can document, the more effective presentation we can make.

Therefore, we ask that you make a serious commitment in the next several weeks to providing us with information relating to your program's use of IOLTA funds in providing representation to poor people. To present a comprehensive look at the importance of this funding source, we would like as much information as we can get from the program and state levels.

Specifically, we need for you to provide information (where relevant) at either the program or state level related to the following issues:

1. Amount of IOLTA funding you receive;
2. Number of employees this funding supports;
3. Number of cases/matters your program attributes to IOLTA funding (if you don't account separately, I suggest you apply a percentage reflecting your IOLTA percentage of funding to your overall case statistics);
4. Breakdown of these cases/matters by type;
5. Delivery initiatives that contribute to the administration of justice/access issues supported by IOLTA funding in your program/state (e.g. pro se efforts, hotlines, technological innovation);
6. A short narrative of how IOLTA contributes to the provision of legal services to poor people in your program/state;
7. Strong anecdotal examples that bring home what this resource means in human terms related to critical legal needs (e.g. a compelling family violence case; saving a family farm; helping a disabled child, representation of the elderly; etc.); and

8. Other information you would like to add

Unfortunately, the Court's briefing schedule does not provide us with a luxury of time to produce our work product. The briefs are due from the Legal Foundation of Washington and *amici* on September 23. Therefore, we need your responses by **AUGUST 7**. We don't need reams of information from each respondent, so I hope this short timeframe does not deter your response. The more comprehensive the factual data we can gather, the stronger the arguments we can present.

If possible, please provide your response electronically to:

d.saunders@nlada.org.

The Legal Foundation of Washington, the ABA and the National Association of IOLTA Programs and their outstanding team of pro bono counsel from across the nation are doing a tremendous job of preparing the case for the Supreme Court. We are working closely with them to ensure that our support brief is consonant with the theories they are espousing as primary litigants. Please help us do our part in supporting the litigation.

Thank you. If you have any questions, either e-mail me or give me a call at 202-452-0620 ext. 224.

cc: IOLTA Program Directors

APPENDIX B

List of Survey Respondents

Alabama
- Legal Services of Metro Birmingham, Inc.

Arizona
- DNA-People's Legal Services

California
- Child Care Law Center
- California Center for Law and the Deaf
- Public Law Center - Orange County
- Grey Law of Ventura County, Inc.
- Voluntary Legal Services Program of Northern California, Inc.
- Consumer Center for Health, Education and Advocacy
- Western Law Center for Disability Rights
- Homeless Action Center
- Legal Services for Prisoners With Children
- Legal Aid Society-Employment Law Center

Connecticut
- Connecticut Legal Services
- New Haven Legal Assistance Association, Inc.
- Greater Hartford Legal Aid

Delaware
- Community Legal Aid Society
- Legal Services Corp of Delaware
- Delaware Volunteer Legal Services

Florida
- Jacksonville Area Legal Aid, Inc.
- Northwest Florida Legal Services, Inc.
- Florida Justice Institute, Inc.
- The Florida Bar Foundation
- Legal Services of Greater Miami, Inc.
- Florida Legal Services, Inc.
- Legal Aid Society of the Orange County Bar Association, Inc./Central Florida Legal Services, Inc.

Georgia
- Georgia Law Center for the Homeless
- Georgia Legal Services Program
- Atlanta Legal Aid Society
- State Bar of Georgia Pro Bono Project
- Atlanta Volunteer Lawyers Foundation

Idaho
- Idaho Legal Aid Services

Illinois
- Legal Assistance Foundation of Metropolitan Chicago
- Land of Lincoln Legal Assistance Foundation, Inc.

Indiana
- Indiana Pro Bono Commission
- Legal Aid Society of Evansville, Inc.

Iowa
- Muscatine Legal Services

Kentucky
- Volunteer Lawyers of Appalachian Kentucky

Louisiana
- The Advocacy Center
- Southeast Louisiana Legal Services
- New Orleans Legal Assistance Corp.
- AIDSLaw of Louisiana, Inc.

Maine
- Maine Equal Justice Partners/Project
- Pine Tree Legal Assistance
- Volunteer Lawyers Project

Maryland
- Maryland Volunteer Lawyers Service

Massachusetts
- National Consumer Law Center
- Massachusetts Justice Project
- Family Advocacy Program
- Massachusetts Legal Assistance Corp.

Michigan
- Center for Civil Justice
- Michigan State Bar Foundation

Minnesota
- Minnesota State Bar Association
- FLAG, Inc.

Missouri
- UMKC Entreprenuerial Legal Services Clinic
- Legal Aid of Western Missouri
- Legal Services of Eastern Missouri, Inc.

Nebraska
- Nebraska Legal Services

New Hampshire
- New Hampshire Legal Assistance

New Mexico
- State Bar of New Mexico, Pro Bono and Referral Division
- Advocacy, Inc.
- New Mexico Center on Law and Poverty
- Legal FACS
- Senior Citizens Law Office

New York
- Legal Aid for Broome & Chenango, Inc.
- Neighborhood Legal Services, Inc.
- Oak Orchards Legal Services, Inc.
- Greater Upstate Law Project

North Carolina
- North Carolina Prisoner Legal Services, Inc.
- North Carolina Justice and Community Development Center
- Carolina Legal Assistance
- Legal Services of Southern Piedmont
- Legal Aid of North Carolina

Ohio
Northeast Ohio Legal Services
Ohio Legal Assistance Foundation
Oklahoma
Legal Aid Services of Oklahoma, Inc.
Oregon
Legal Aid Services of Oregon
South Carolina
SC Appleseed Legal Justice Center
Tennessee
Tennessee Justice Center
Legal Aid Society of Middle Tennessee
Texas
Houston Volunteer Lawyers Program, Inc.
Legal Services of North Texas
Vermont
Vermont Legal Aid
Virginia
Legal Services Corporation of Virginia
Washington
Northwest Justice Project
Wisconsin
Legal Action of Wisconsin, Inc.

APPENDIX C

Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202-558-0302

September 4, 2002

[REDACTED]*
Seattle, WA 98177

Dear [REDACTED],

It's probably the most important, certainly the hardest and longest-fought, effort in the history of Washington Legal Foundation. We are finally in a position we've fought more than a decade to reach - a position where we can deal a death blow to the single most important source of income for **radical legal groups** all across the country.

But even though victory is so close ... it's not over yet. Not by a long shot!

I'm talking about **IOLTA, Interest on Lawyers Trust Accounts**, the program *Forbes* once called "the legal left's most reliable source of income." **IOLTA** is the program in all 50 states under which lawyers are required to turn over any interest earned on their clients' trust accounts to a state-run group which then doles out the money to legal services groups.

We're not talking about pocket change, [REDACTED], we're talking about a staggering **$150 million a year!** And that is why this has been such a long, drawn-out, hard-fought battle. When we first started this fight back in 1991, nobody paid much attention.

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* Information identifying the recipient has been redacted for privacy reasons.

But by the time we won our first U.S. Supreme Court victory in this matter, in 1998 in *Phillips v. Washington Legal Foundation*, **we faced organized opposition from 157 groups and individuals!** That's how serious this really is!

In its 1998 decision, the Court upheld our position that interest earned on **IOLTA** bank accounts is the private property of those whose funds generated the interest. That fact seems obvious, yet *it was disputed by every state in the nation.*

BUT ... the Court did not rule on our position that **IOLTA** violates the Fifth Amendment's Takings Clause, which prohibits the government from seizing private property without paying -compensation, even though that would seem equally obvious. The U.S. Supreme Court sent that matter back down to lower courts for resolution.

Now, after an incredibly difficult series of court battles, we have convinced the U.S. Supreme Court to make a final ruling on this all-important matter in *Washington Legal Foundation v. Legal Foundation of Washington.*

And the opposition threatens to dwarf the **157 groups** that filed against us in 1998! Naturally, the **American Bar Association** continues its position as the leader determined not to let us shutdown their money pump. *But they'll be joined by practically every **IOLTA** group and state bar association in the country, by legal aid societies and state legal services associations, by groups dedicated to the homeless, to minorities, to gay and lesbian causes, and any other group that has drawn money from hard-working Americans like you and me to support its **radical** cause!*

This is what we've been working for since 1991 and we **cannot, must not, will not,** let victory slip away from us now! Everyone at WLF is working around the clock preparing for our U.S. Supreme Court case and will continue to do whatever it takes to convince the Justices of the correctness of our position.

But **we need you** if we hope to stand up to those groups. Desperately. Loyal, caring, mainstream Americans like you have made it possible for us to get this far, and we need you *now* if we are to see this through to victory!

It's an abomination that **IOLTA** can take money that is rightly the property of Americans like you and me and use that money to support programs we oppose, that stand in direct opposition to everything we believe in.

They're not going to win! We've come this far and we're going to end this abominable program! We must! And we will ... ***if*** we can continue to count on wonderful, loyal friends like you.

Will you consider a contribution today of $100, $250 or even $500 to help us take this last great stride toward victory in the U.S. Supreme Court? If we can stop **$150 million** a year from going to these **radical legal groups**, it will be one of your most rewarding investments ever! Thank you.

Warm regards,

/s/ Dan
Daniel J. Popeo
General Counsel

DJP/hls

P.S. We don't know the exact date the U.S. Supreme Court will call this case, but there's so much to be done, it would really mean a lot if you could send your gift today. Thanks!

Supreme Court, U.S.
FILED
OCT 18 2002
OFFICE OF THE CLERK

No. 01-1325

IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, *et al.*,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND TRIAL LAWYERS FOR PUBLIC JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an "Interest on Lawyer Trust Account" program violates the Just Compensation Clause of the Fifth Amendment where the program causes no economic harm to the claimants and thus just compensation for any taking would be zero.

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IN THE

Supreme Court of the United States

No. 01-1325

WASHINGTON LEGAL FOUNDATION, *et al.*,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND TRIAL LAWYERS FOR PUBLIC JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE* [1]

The National League of Cities (NLC) is a non-profit organization whose members include 49 state municipal leagues and approximately 1,800 member cities and towns. Through the member state municipal leagues, NLC also represents more than 18,000 municipalities.

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk.

The International Municipal Lawyers Association (IMLA) is a non-profit organization that has served as an advocate for municipal attorneys since 1935. Its members include lawyers from more than 1,400 municipalities. IMLA serves as the legal voice for the nation's local governments and thus has a vital interest in legal issues that affect municipalities.

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm dedicated to creating a more just society. Through precedent-setting litigation, TLPJ prosecutes cases designed to enhance consumer and victims' rights, environmental protection, civil rights and liberties, workers' rights, America's civil justice system, and the protection of the poor and powerless. In particular, TLPJ has long fought to preserve an open and accessible system of justice in this country.

Amici have diverse and sometimes competing interests. Notwithstanding these differences, we share an abiding interest in protecting appropriate access to justice and ensuring that takings jurisprudence continues to allow local officials to protect the public interest without fear of inappropriate and exorbitant compensation awards. *Amici* also are united in our view that Interest on Lawyer Trust Account ("IOLTA") programs do not violate the Just Compensation Clause of the Fifth Amendment.

SUMMARY OF ARGUMENT

The Just Compensation Clause does not proscribe takings of private property, but merely conditions any taking on the payment of just compensation. *E.g., First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The just compensation requirement serves to put the claimant "in as good a position pecuniarily as if [the] property had not been taken." *Olson v. United States*, 292 U.S. 246, 255 (1934). Where a taking causes no pecuniary harm, just compensation for the taking is zero and

no violation of the Just Compensation Clause occurs. Courts repeatedly have declined to award relief for both direct and inverse condemnations where the taking caused the claimant no economic harm. Because respondents' IOLTA program does not cause petitioners economic harm, just compensation for any taking would be zero. Thus, even assuming *arguendo* that a taking occurred, the IOLTA program does not violate the Just Compensation Clause.

Petitioners' contention that *every* taking requires affirmative relief, regardless of whether it causes economic harm, is a radically new *per se* remedial rule that would apply to both direct and inverse condemnations. It would improperly curtail the sovereign power of eminent domain, contravene longstanding precedent, and disregard this Court's wise admonition to resist "'[t]he temptation to adopt what amount to *per se* rules in either direction'" in takings cases. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478, 1481 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

ARGUMENT

Respondents' briefs show that they should prevail on two independent grounds. First, the IOLTA program does not constitute a taking of petitioners' property. Second, assuming for the sake of argument that a taking has occurred, there is no violation of the Just Compensation Clause because the IOLTA program caused petitioners no economic harm and thus no compensation is due.

This amicus brief focuses on respondents' second showing, supplementing it in three ways. First, we describe many situations in which courts have found no violation of the Just Compensation Clause—notwithstanding the existence of an uncompensated taking—because the taking caused no economic harm. Second, we demonstrate that

nothing in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), suggests that a violation of the Just Compensation Clause may occur where the claimant suffers no economic harm. Indeed, the subsequent history of *Loretto* in state court shows that despite the taking of Loretto's property, the court held that there was no constitutional violation because Loretto failed to show that she suffered economic harm. Third, we explain how petitioners' position would dramatically disrupt the ability of local governments to protect the public interest through the exercise of their sovereign power of eminent domain.

I. NO VIOLATION OF THE JUST COMPENSATION CLAUSE OCCURS WHERE A TAKING CAUSES NO ECONOMIC HARM AND THUS JUST COMPENSATION IS ZERO.

The central fact of this case is that Washington's IOLTA program has not caused petitioners economic harm. As shown in respondents' briefs and the rulings below, the funds at issue would not have earned interest absent the IOLTA program. Thus, petitioners have suffered no pecuniary loss.[2]

In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), this Court deferred consideration of the significance

[2] *E.g.*, Pet. App. 33a (Ninth Circuit: "Thus, because no interest would be earned on client funds deposited by escrow and title companies absent the IOLTA program, requiring those companies to place client funds in IOLTA accounts has no economic impact on the owners of the principal. Indeed, if there be any economic impact, it is a positive one."); Pet. App. 38a (Ninth Circuit: "[T]he alleged loss of the escrow and title companies' earnings credits had no economic impact on [the claimants]."); Pet. App. 87a (District Court: "[IOLTA] programs are premised on the idea that the interest created by the pooled funds could not create a net profit * * * for the client-depositor."); Pet. App. 94a (District Court: "[I]n no event can the client-depositors make any net return on the interest accrued in these accounts. Indeed, if the funds were able to make any net return, they would not be subject to the IOLTA program.").

of this fact as it relates to the issue of just compensation, expressing "no view" as to the amount of just compensation, if any, that would be due if the IOLTA program were deemed a taking of property. *Id.* at 172. Because the compensation issue is now squarely before the Court, petitioners' inability to receive any net interest on funds subject to IOLTA has become "the most salient fact" of the case. *Id.* at 173 (Souter, J., with whom Stevens, Ginsburg, & Breyer, JJ., join, dissenting).

The Just Compensation Clause—"nor shall private property be taken for public use, without just compensation"—is different in kind from most other provisions of the Bill of Rights. It does not prohibit government conduct, but merely conditions the taking of property on the payment of adequate compensation. As the Court noted in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Just Compensation Clause "makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 315.

With respect to both direct and inverse condemnations, "there is no constitutional violation 'unless or until the state fails to provide an adequate postdeprivation remedy for the property loss.'" *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714-15 (1999) (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984))). In other words, where the condemnor provides adequate compensation, the property owner "suffer[s] no constitutional injury from the taking alone." *Del Monte Dunes*, 526 U.S. at 710.[3]

[3] *Accord, Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997) (where the government provides adequate compensation, "the

Moreover, it is black-letter law that where a taking causes no economic harm, just compensation is zero. To be sure, "property is more than economic value." *Phillips*, 524 U.S. at 170. But just compensation is not. Just compensation considers only the economic value of the property. The constitutional guarantee of just compensation is designed simply to put "the owner of the condemned property 'in as good a position *pecuniarily* as if [the] property had not been taken.'" *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934) (emphasis added)); *accord*, *United States v. Reynolds*, 397 U.S. 14, 16 (1970) ("The owner is to be put in the same position monetarily as he would have occupied if [the] property had not been taken.").

Applying these principles, courts repeatedly have held that, notwithstanding the existence of an uncompensated taking, no violation of the Just Compensation Clause occurs where the challenged government action causes no economic harm to the claimant. In particular, courts have refused to award compensation where a taking did not interfere with the claimant's profitable operations, where special benefits conferred by a taking nullified any alleged economic harm, and where the condemned land was valueless. We set forth representative examples of each of these scenarios below.[4]

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property owner cannot claim a violation of the Just Compensation Clause"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n. 21 (1984) (same); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11-12 (1990) (same).

[4] The Ninth Circuit held that "even if the IOLTA program constituted a taking of * * * private property, there would be no Fifth Amendment violation because the value of their just compensation is nil." Pet. App. 45a. *Amicus* Home Builders mischaracterizes this ruling as "requiring a calculation of just compensation before a Fifth Amendment taking can be found to exist." NAHB Br. 3. The ruling on its face, however, plainly assumes the existence of a taking and observes that despite the assumed taking, there would be no constitutional violation because no compensation would be due. The Home Builders' misreading of the Ninth Circuit in this regard renders its brief largely beside the point.

A. Takings That Do Not Reduce the Value of the Claimant's Property

In *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280 (1926), the Court addressed a takings claim based on a presidential proclamation that the government was temporarily taking control of the claimant's railroad. In fact, however, the government never exercised actual control or interfered with its operations. *Id.* at 282-83. Writing for a unanimous Court, Justice Brandeis found no constitutional violation, concluding that even assuming that the government's proclamation worked a taking, no economic harm resulted and thus no compensation was due:

> For even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company, and it was not subjected by the government to pecuniary loss.

Id. at 282. The Court emphasized that no evidence "show[ed] that the alleged taking had subjected the company to any pecuniary loss or had deprived it of anything of pecuniary value." *Id.* at 286.

Likewise, in *Fulmer v. State*, 134 N.W.2d 798 (Neb. 1965), the Nebraska Supreme Court relied on the lack of economic harm in refusing to award compensation for a condemnation of a permanent easement that prohibited advertising on farmland adjacent to an interstate highway. The state submitted evidence showing that any income from advertising would be so small as to be disregarded by potential purchasers, and thus there was no difference in the value of the land before and after the taking. *Id.* at 800. The

court concluded that the "evidence supports the finding that the landowner was not damaged by the taking of the easement." *Id.*

In *State v. Wabash R.R. Co.*, 889 S.W.2d 181 (Mo. Ct. App. 1994), the state condemned a permanent easement on a portion of a railroad right-of-way for an interstate off-ramp, as well as a temporary construction easement. *Id.* at 181-82. The court affirmed a jury award of zero damages because the evidence "established that no interference to the [railroad's] use of the land occurred and the railroad's evidence failed to show any damage to the remaining parcel." *Id.* at 184.

In the same way, the IOLTA program has not caused petitioners any pecuniary loss. Thus, the program does not violate the Just Compensation Clause regardless of whether it works a taking.

B. Takings With Offsetting Special Benefits

No constitutional violation occurs for an uncompensated taking where special benefits conferred by the taking nullify any economic harm. For instance, the Federal Circuit declined to award relief for a taking of property near the notorious Stringfellow Acid Pits in California. *Hendler v. United States*, 175 F.3d 1374 (Fed. Cir. 1999) (Plager, J.). The court had previously concluded that a physical taking occurred where the government installed wells on the claimants' land to monitor ground water as part of a cleanup under the federal Superfund program. *Id.* at 1377-78. Nevertheless, the Federal Circuit affirmed the trial court's denial of compensation because the special benefits conferred on the land by the cleanup outweighed the value of the easements taken by the government. *Id.* at 1379-1383. In so ruling, the court invoked "the underlying equitable principle that the Government's obligation is, to the extent possible following the Government's intrusion, to restore the landowner to the position he was in absent any government

action." *Id.* at 1382. Because the challenged cleanup activities caused no economic harm, no compensation was due. *Id.* at 1383.

Similarly, in *Bartz v. United States*, 633 F.2d 571 (Ct. Cl. 1980) (per curiam), the Federal Circuit's predecessor relied on offsetting benefits in refusing to award compensation for an alleged taking of farmland by recurring flooding purportedly caused by the Coralville Dam on the Iowa River. *Id.* at 576-77. The court concluded that any economic injuries from the flooding "were heavily countervailed by the benefits to the [claimants'] farmlands as a whole." *Id.* at 577-78.

Condemnations of land for public highways often give rise to offsetting special benefits that result in zero-compensation awards. For example, in *State v. Templeman*, 693 P.2d 125 (Wash. Ct. App. 1984), the trial court entered a judgment on a jury verdict of zero dollars as just compensation for a condemnation of portions of two parcels comprising about 65 acres for a state highway project. Expert testimony showed that the claimants' holdings would be worth more after the road improvements. *Id.* at 126. The appeals court affirmed the judgment. *Id.* at 129.

As in these offset cases, petitioners have suffered no economic harm from the IOLTA program and thus are entitled to no relief under the Just Compensation Clause.

C. Takings of Valueless Land

An uncompensated taking causes no constitutional violation where the condemned land is valueless. In *State v. The Mill*, 887 P.2d 993 (Colo. 1995), the Supreme Court of Colorado declined to award compensation or other relief for the condemnation of a 61-acre parcel previously used for uranium milling operations where the parties stipulated that the market value of the property in its contaminated state was

zero. *Id.* at 997-98. The court noted that "[i]f the property owner were allowed to collect the value of the property in its decontaminated state, the property owner would not only be spared the expense of cleanup, but would also receive the increase in market value resulting from the cleanup," a result the court denounced as "windfall profits." *Id.* at 1006.

So too here. Petitioners have suffered no economic harm from the IOLTA program and thus any relief afforded them under the Just Compensation Clause would be an unfair windfall. Such a result cannot be justified under a constitutional provision whose application is informed by "fairness and justice." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[5]

II. *LORETTO* CONFIRMS THAT NO VIOLATION OF THE JUST COMPENSATION CLAUSE OCCURS ABSENT ECONOMIC HARM.

Petitioners and their *amici* argue that this Court's ruling in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), shows that government action may violate the Just Compensation Clause regardless of whether that action

[5] This Court also has reached zero-compensation results under other constitutional provisions. For instance, in *Perry v. United States*, 294 U.S. 330 (1935), the Court ruled that the Congress exceeded its constitutional powers and breached contracts by abrogating gold clauses under which the principal and interest on various government obligations were payable in gold coin. *Id.* at 346-54. Nevertheless, the Court held that the claimant was not entitled to any relief because it failed to show economic harm in view of other congressional action withdrawing gold coin from circulation and prohibiting its exportation. Stressing that the claimant could "recover no more than the loss he has suffered" and "is not entitled to be enriched" (*id.* at 354-55), the Court concluded that the claimant had not shown "that in relation to buying power he has sustained any loss whatever." *Id.* at 357. Thus, the Court wrote, compensation "would appear to constitute, not a recoupment of loss in any proper sense, but an unjustified enrichment." *Id.* at 358.

causes economic harm to the claimant. They note that *Loretto* holds that a taking may occur even where the challenged government action enhances the value of the property at issue. Pet. Br. 34 n.13; NAHB Br. 5-6; PLF Br. 3-4. Their reliance on *Loretto* is misplaced.

Loretto involved the physical occupation of real property, a circumstance that easily distinguishes it from the case at bar. As respondents show, *Loretto* thus has little relevance to the issue of whether a taking has occurred. But with respect to the issue of just compensation, the full history of *Loretto* shows exactly the opposite of what petitioners suggest. This Court's "very narrow" holding in *Loretto* (458 U.S. at 419) expressly declined to address whether the Just Compensation Clause required compensation for the taking, and instead remanded that issue to the state court. *Id.*

On remand, the state court refused to award Loretto attorneys' fees as a prevailing party because she failed to "establish the deprivation of any federal right." *Loretto v. Group W Cable*, 522 N.Y.S.2d 543, 545 (App. Div. 1987). The court observed that although Loretto established that the defendant took her property, "that alone does not amount to the deprivation of a right." *Id.* After noting that in takings cases "no constitutional violation occurs until just compensation is denied," *id.* at 546 (quoting *Williamson County*), the state court concluded that Loretto had failed to demonstrate a right to compensation and thereby "prove any underlying constitutional violation." *Id.* The court stressed that Loretto's showing of a taking was thus "of purely academic interest." *Id.*

Far from showing that every taking must result in the payment of compensation regardless of economic injury, the full history of *Loretto* confirms that courts should not award compensation where the challenged measure causes no economic harm to the claimant. Because Loretto failed to show that the statute at issue caused economic harm, she

could not show a constitutional violation that entitled her to attorneys' fees as a prevailing party. In the same way, petitioners' inability to demonstrate economic harm from the IOLTA program precludes them from showing a violation of the Just Compensation Clause.

III. PETITIONERS' POSITION WOULD IMPROPERLY CURTAIL THE SOVEREIGN POWER OF EMINENT DOMAIN.

Ignoring the longstanding precedent discussed above, Petitioners and their *amici* take an extraordinary position. They argue that even in the absence of economic harm, the Just Compensation Clause compels relief for "non-economic rights" and "nonmonetary" components of their property interest. Pet. Br. 35; PLF Br. 3. In particular, they emphasize that the IOLTA program impairs petitioners' right "to control the uses to which their property is put" or to have a "voice" in how the interest generated by IOLTA accounts is spent. Pet. Br. 36-37; PLF Br. 4.

Petitioners essentially assume that interference with a claimant's subjective view on how condemned property should be used is compensable. This contention reflects a fundamental misunderstanding of the government's authority to take property. The power to condemn property is "intimately involved with sovereign prerogative." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959). The very purpose of this sovereign power is to allow the government to take property without the owner's consent and without regard to the owner's desires regarding the disposition of that property. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., with whom Stewart, Marshall, & Powell, JJ., join, dissenting) (citing 6 J. Sackman, *Nichols' Law of Eminent Domain* § 1.11 (3d ed. rev. 1980)). Because the measure of just compensation is a purely "pecuniar[y]"

standard (*Olson, supra*), the claimant's personal predilection regarding how the property should be used is utterly irrelevant to the amount of compensation due for any taking.

Of course, some infringements of so-called "non-economic" interests, such as the right to exclude, do cause economic harm. And when such an infringement constitutes a taking, the Fifth Amendment requires compensation to redress the economic harm. But as the *Loretto* case shows, absent economic harm, a taking that impairs the right to exclude or other non-economic interests results in no constitutional violation. *See* Section II, *supra*. By relying on their own subjective views of how the property at issue should be used, petitioners contravene longstanding rulings that "just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner." *United States v. 50 Acres of Land*, 469 U.S. 24, 35 (1984); *accord, Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

Petitioners spend considerable rhetorical energy insisting that their non-economic interests must "have *some* value." Pet. Br. 17, 37. But they cite no appraisal evidence showing the value of their non-economic interests. Because petitioners have not shown economic harm caused by the IOLTA program, they are already in as good a position pecuniarily as they would have been in the absence of the program. Just compensation for any taking would be zero, and thus no constitutional violation has occurred.

Consider the implications of petitioners' position for workaday condemnations. Most takings claimants would prefer to keep the condemned property. Under petitioners' theory, a claimant could seek compensation not only for economic harm caused by the taking, but also for the "non-economic" injury caused by the failure to consider the claimant's voice as to how the property should be used. On this view, absent adequate compensation for these interests—

which petitioners acknowledge have "no readily determinable fair market value" (Pet. Br. 37)—the claimant could seek injunctive relief to block the exercise of eminent domain authority. Such a result would be unprecedented in the annals of takings jurisprudence and seriously undermine the ability of public officials to exercise the sovereign authority to condemn property in the public interest.

Petitioners and their *amici*, in effect, ask this Court to devise two new *per se* rules of takings liability: one *per se* rule that deems every IOLTA program in the country to be a taking of private property, and a second *per se* rule that requires compensation for every taking, regardless of whether the claimant has suffered economic harm. Each of these proposals contravenes the Court's wise admonition to resist "[t]he temptation to adopt what amount to *per se* rules in either direction" in takings cases. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478, 1481 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). The text of the Constitution and longstanding precedent require that any such temptation be resisted here as well.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October 18, 2002

Supreme Court U.S.
FILED
OCT 18 2002
OFFICE OF THE CLERK

No. 01- 1325

IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, AND L. DIAN MAXWELL,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE LEGAL FOUNDATION OF WASHINGTON; AND GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, AND CHARLES Z. SMITH, IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE SUPREME COURT OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF TEXAS AND THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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The Chief Justice and Justices of the Supreme Court of Texas, and the Texas Equal Access to Justice Foundation ("TEAJF"), respectfully submit this brief as *amici curiae* supporting the Respondents in this case.[1]

INTEREST OF AMICI CURIAE

The *amici* are defendants in litigation brought by Petitioner Washington Legal Foundation ("WLF") and two other plaintiffs challenging the constitutionality of the Texas IOLTA program. The *amici* previously were before this Court as petitioners in that case. *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998). In *Phillips*, this Court held that "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal," but remanded for consideration of "whether these funds have been 'taken' by the State" and "the amount of 'just compensation,' if any, due respondents." 524 U.S. at 172.

On remand from this Court, the district court presided over a trial on the merits, made extensive findings of fact, answered both questions left open by this Court in favor of the *amici*, and upheld the constitutionality of the Texas IOLTA program. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 86 F. Supp. 2d 624 (W.D. Tex. 2000).[2] The district court found that the Washington Legal Foundation and its co-plaintiffs, including William Summers (the sole client in the Texas case), "failed

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[1] Pursuant to Supreme Court Rule 37.3(a), the *amici* have obtained from all parties their written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, the *amici* state that no counsel for the petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than *amici* or its counsel, make a monetary contribution to the preparation or submission of this brief.

[2] In this brief, we refer to the proceedings on remand from this Court's 1998 decision in *Phillips* as "the Texas case."

to present any evidence that Mr. Summers' money . . . did and could" generate net interest, or a net benefit, if not for IOLTA. 86 F. Supp. 2d at 642-43. "[B]ased upon all the evidence before it," including Mr. Summers's own admission that "he was no worse off because of IOLTA," *id.* at 638, the district court found as a fact that "Mr. Summers's loss is zero." *Id.* at 643.

A divided panel of the Fifth Circuit reversed. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 270 F.3d 180 (5th Cir. 2001). The panel did not overturn any of the district court's findings of fact, but held instead that plaintiffs' failure to show any loss was "not relevant" and a "non-factor in the takings analysis." *Id.* at 188 n.6. The Fifth Circuit denied rehearing en banc by an evenly divided vote of 7-7. 293 F.3d 242 (5th Cir. 2002). *Amici*'s petition for certiorari currently is pending before this Court. (No. 02-01).

This case concerns the constitutionality of an IOLTA program of a sister State and presents issues very similar to those involved in *amici*'s own case. Indeed, WLF is a named plaintiff that has actively participated in both cases. The *amici* thus have a vital interest in the outcome of this case.

SUMMARY OF ARGUMENT

Petitioners' argument that property has been taken from them for which they are entitled to be compensated is refuted by the trial record in the Texas case. After hearing testimony from banking experts, lawyers, and the plaintiff client, the district court found as a matter of fact that clients such as Mr. Summers incur no loss as a result of IOLTA programs. The record in the Texas case establishes that there is no economic loss, nor is there loss of any non-economic property right such as the right to control the use of one's property.

Deprived of a factual foundation, Petitioners' legal arguments depart from virtually every accepted principle of Just Compensation law. Petitioners argue for an extension of "per se" takings analysis – a position this Court rejected just last Term. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478, 1481 n.23, 1489 (2002). They argue that just compensation should be measured by the value of the IOLTA program to the government rather than from by the loss to the property owner – also contrary to established principles. *See, e.g., United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913); *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). They argue that the absence of any compensable loss entitles them to an injunction and, implicitly, that they are entitled to seek redress in the federal courts rather than through any available state processes – again, arguments that have been rejected by this Court. *See City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687, 710 (1999); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985).

While this Court has long recognized that not every loss of property constitutes a Fifth Amendment "taking," *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), Petitioners' ultimate argument is that there can be an unconstitutional taking without the loss of any property right. That proposition not only lacks support in this Court's precedents, but contravenes the very purpose of the Just Compensation Clause. As this Court has recognized, the Clause is not a substantive limitation on government action. Rather, it provides those who have suffered a loss on account of government action a means of securing compensation. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987); *see also Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

In the absence of any loss that merits compensation, Petitioners cannot establish a violation of the Fifth Amendment's Just Compensation provisions and are not entitled to an injunction.

ARGUMENT

In upholding the Washington IOLTA program, the Ninth Circuit en banc court correctly concluded that (i) there was no adverse economic impact on property owners; (ii) there was no interference with investment-backed expectations; and (iii) given the highly regulated nature of the banking and legal professions, the IOLTA regulations did not exceed what is "just and fair." *Washington Legal Foundation v. Legal Foundation of Washington,* 271 F.3d 835, 857-61 (9th Cir. 2001) (en banc). The court also held that even if the IOLTA program constituted a taking of clients' property, there would be no Fifth Amendment violation because "the value of their just compensation is nil." *Id.* at 864.

Each of those conclusions – all of which were based on the summary judgment record developed prior to this Court's decision in *Phillips* – is supported and confirmed by the trial record in the Texas case. In deciding "ultimate questions" of law, this Court has at times looked for "a more solid basis of findings based on litigation" than can be provided in a summary judgment record. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948); *see also Dombrowski v. Eastland*, 387 U.S. 82, 94 (1967); *United States v. International Union United Auto.*, 352 U.S. 567, 591-92 (1957). On a number of occasions, the Court has turned to the record in other cases to assist it in resolving the questions presented in the case on certiorari. *See Leary v. United States*, 395 U.S. 6, 48-53 & n.97 (1969) (assessing constitutionality of statute by looking to findings from a trial record in another case); *National Fire Insurance Co. of Hartford v. Thompson*, 281 U.S. 331, 336 (1930) (taking

notice of the record in another case); *Hisock v. Varick Bank of New York*, 206 U.S. 28, 39 (1907) (same).

Consideration of the record in the Texas case is particularly appropriate here, since Petitioner WLF is a named plaintiff and active litigant in both cases, and had a full and fair opportunity to participate at trial. In deciding the questions left open by this Court on remand in *Phillips,* the district court heard testimony from the plaintiff client (Mr. Summers), the plaintiff lawyer, lawyers from Texas and elsewhere who explained the workings of their client trust accounts, an expert on banking and trust and estate law, the general counsel of the Independent Bankers' Association of Texas, and TEAJF officials.

Based on the testimony and other evidence, the district court held that there could be no Fifth Amendment violation because Mr. Summers had not suffered a compensable loss under any of the accounting theories presented by the plaintiffs. 86 F. Supp. 2d at 638-43. In addition, the court found that "[e]mploying an ad hoc analysis, and applying the fundamental principles of justice and fairness the Court finds that a taking has not occurred. The IOLTA program is not in any way unfair to Plaintiffs." *Id.* at 647.[3]

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[3] The court also held that the Texas IOLTA program did not unconstitutionally burden the plaintiffs' First Amendment rights. Noting Mr. Summers' testimony that he did not believe that he personally was identified with any of the causes funded by TEAJF with IOLTA funds, the court held that the program did not violate his right not to speak. *Id.* at 633-34. The court also held that IOLTA did not force property owners to financially support political ideological activity to which they objected. The court assumed for the sake of argument that there was a "compelled involuntary contribution," but held that helping ensure equal access to the justice system was not itself a political or ideological activity, and was germane to an important government interest in making legal services accessible to all. *Id.* at 634-37. On appeal, the Fifth Circuit did not

In the Washington case now before the Court, Petitioners rely on many of the same factual assertions rejected by the Texas district court and left undisturbed by the Fifth Circuit, namely that they have suffered a "loss" and are being unfairly singled out to bear a "burden." As set forth below, those claims – critical to Petitioners' constitutional arguments – could not be substantiated in the Texas trial.

I. CLIENTS INCUR NO LOSS AS A RESULT OF IOLTA PROGRAMS

A. There Is No Economic Loss

Petitioners assert in passing that they are economically worse off as a result of the Washington IOLTA program. *See* Pet. Br. 31 & n.11; 36 n.14. When Petitioner WLF was before this Court in *Phillips*, it made similar claims, and at much greater length. Part II of WLF's brief on the merits in *Phillips* argued that "virtually all clients would benefit financially if their funds were kept out of the IOLTA program." Brief of Resp. in No. 96-1578, at 36-45. Quoting an affidavit submitted by New York lawyer Robert J. Randell, WLF asserted: "It is common knowledge that today, interest net of any fees can be earned on virtually all client funds." *Id.* WLF's brief to this Court described a procedure known as "sub-accounting," by which "a lawyer opens in each client's name and tax identification number an interest-bearing account under the umbrella of, and linked electronically with, the lawyer's main trust account." *Id.*

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reach the First Amendment question. 270 F.3d at 185-86. The dissenting judge noted, however, that the First Amendment claim "will fall of its own weight." *Id.* at 203 n.43 (Wiener, J., dissenting). In the case under review, the Ninth Circuit also did not reach the First Amendment question. 271 F.3d at 871.

"The interest accrues to each sub-account separately, thereby eliminating any requirement that the attorney himself allocate total interest." *Id.* The bank also handles "IRS reporting tasks associated with each client's sub-account." *Id.* WLF suggested that such sub-accounting services are available from Texas banks "free of charge." *Id.*

On remand from this Court, WLF and its co-plaintiffs utterly failed to substantiate the assertions in Mr. Randell's affidavit. Mr. Randell testified concerning sub-accounting, as well as two additional methods by which funds deposited in IOLTA accounts allegedly could be made to earn a net benefit for the client: "in-firm pooling" and a "net benefit" theory. However, the district court found that the client funds at issue could not have earned interest for the client under *any* of these methods. 86 F. Supp. 2d 638-43. This finding was consistent with testimony by the client himself, Mr. Summers, who candidly admitted that he was "no worse off" as a result of the IOLTA program. *Id.*; Tr. 136.

"In-firm pooling," according to Mr. Randell, requires a lawyer to place client funds in a single money market account. The bank notifies the lawyer of the interest earned on the account, and then it is the lawyer's responsibility to "apportion[ ] the interest to each client." 86 F. Supp. 2d at 639. Mr. Randell testified that he employs in-firm pooling in his own law practice and charges clients an "administrative fee" equal to "about one-half of the interest earned" for his services. *Id.* Mr. Randell acknowledged, however, that he "rarely has the funds of more than six clients in his account," and sometimes "does not place client funds in an interest-bearing account because it is too little money or for too short a period of time to gain a net benefit for the client." *Id.*

The district court found that Mr. Randell's situation is "unique," because it involves "a small number of transactions, larger amounts of money, and . . . lengthy time periods." *Id.* The court found that these funds "in most cases

would earn a net benefit for the client without in-firm pooling." *Id.* Moreover, the "administrative fee" charged by Mr. Randell is assessed in such a way that "the larger dollar amounts in his 'pool' in effect pay the costs for smaller amounts and allow those smaller amounts to earn interest." *Id.* Mr. Randell "is subsuming the bank's role in an effort to generate an added administrative fee for his practice, albeit with the agreement of his clients," and must also "prepare the 1099 forms for each client earning in excess of $10 in interest." *Id.* In addition, "Mr. Randell's system is not a demand account as mandated by the rules of ethics." *Id.* Accordingly, the court found that "Plaintiffs have failed to establish that Mr. Summers' monies could earn net interest if placed in an in-firm pooled account." *Id.*

As for sub-accounting, the district court reviewed the testimony of witnesses familiar with Texas bank products, and found that "at this point in time sub-accounting is not available in Texas." *Id.* at 639 n.7. Although "a lawyer could in theory, and with his client's agreement, open a sub-account outside of Texas," *id.*, sub-accounting services are not free. The costs of sub-accounting may include monthly fees as well as "activity fees for almost all transactions." *Id.* at 640. In addition to these fees, there may be restrictions on the number of transactions permitted per month, and the account may be closed and the interest forfeited if the balance falls to zero for ten consecutive days. *Id.* Indeed, the district court found that the costs of sub-accounting "make net interest to clients infeasible except in cases where large sums of money are held or when client funds are held for long periods of time." *Id.* at 641-42. In such situations, "the client funds would not be placed in IOLTA" in the first place. *Id.* at 642. Accordingly, the district court found, "Plaintiffs have failed to establish through the evidence before the Court that Mr. Summers' funds could theoretically earn interest in a sub-account." *Id* at 642.

Finally, the district court rejected plaintiffs' "net benefit" theory that "by decreasing the lawyer's costs through use of the client's money, the client will benefit." *Id.* The court found that "allowing attorneys to benefit from their clients trust accounts, even if they pass this benefit on to clients, would qualify as an ethical violation." *Id.* "More importantly," the court found, the plaintiffs' arguments "are made somewhat in a vacuum," because they "failed to present any evidence that Mr. Summers' money . . . did and could generate net benefit or net interest if not for IOLTA." *Id.* at 642-43. "[A]t a minimum Plaintiffs must present evidence to this Court that Mr. Summers is materially worse off because of IOLTA." *Id.* at 643.

In rejecting plaintiffs' contention that virtually all clients could benefit financially outside of an IOLTA account, the district court credited the testimony of lawyer Claude Ducloux. Mr. Ducloux, like 31% of Texas lawyers in private practice, is a solo practitioner. *Id.* at 639. Mr. Ducloux testified that on average he keeps the funds of 20 to 30 clients in his client trust account; that the balance in the account averages between $20,000 and $30,000; that most client funds remain in the account for 30 to 60 days; and that the account earns interest at a rate of 0.72%. *Id.* Mr. Ducloux testified that his client trust account generally earns less than $15 per month in interest, and that in the prior month his account had generated $10 of net interest and $12 in bank charges. *Id.* Mr. Ducloux explained why it is not economically feasible to allocate this relatively small amount of interest among 20 or 30 clients:

> Say somebody comes to me with an uncontested divorce. I usually require a $500 retainer and I talk to the parties. I have a full routine I go through. I would put that $500 into my trust account. I would explain to the client that that money is going into a trust, and

if it's not used up – but it likely will be – they will have a refund of anything that is not used.

I would then have to wait before I started calculating interest on when that check clears. The bank does not give me credit from the day it's deposited . . . Which means I have to get on the phone with the bank two or three days later before I could put in the correct figure and find out if that check given by the client has finally cleared. When it clears, then I make an entry into my billing program.

I would then have to know the interest rate. I would then execute a check from that for $165 for the filing fee [for divorce] in Travis county. Now I have to wait and see when that check clears so I can cut off the interest on that $165 that goes to the district clerk's office. This usually means that either I have to have some unknown technical connection to the bank where I can pull it up and find out immediately or I have to dial my bank's number, enter my code and wait in what I call voice jail for about five minutes until I find out that no, indeed, the check hasn't cleared. So I keep letting it ride and I call back tomorrow again.

Tr. 276-77.

The district court also heard from Karen Neeley, general counsel for the Independent Bankers' Association of Texas, who testified that banks in Texas are not offering sub-accounting because such products are too expensive for the banks. 86 F. Supp. 2d at 641. Ms. Neeley testified that it is time-consuming for banks to set up each sub-account; that bank charges are generally on the increase; that in many cases the use of sub-accounting would result in a net loss to

lawyers' trust accounts; and that the termination of the IOLTA program would not result in the introduction of sub-accounting services in Texas, but reversion to the pre-1984 status quo where lawyers' trust accounts earned no interest. *Id.*

Finally, the district court reviewed the testimony of Bruce Buell, a solo practitioner from Colorado with a specialization in banking and trust and estate law. Mr. Buell testified that IOLTA accounts cost less in bank service charges and require less attorney time than non-IOLTA accounts. He noted that in Texas, the TEAJF pays all bank service and maintenance fees on IOLTA accounts so there is no charge to the attorney; that generally banks do not require minimum balances on IOLTA accounts; that there are no restrictions on transfers or withdrawals, and that there is one monthly reconciliation. By contrast, Mr. Buell testified that bank sub-accounts have maintenance and service fees, minimum balances, restrictions on transfers and withdrawals, and require monthly reconciliations for the master account and each sub-account. *Id.* Finally, the district court credited Mr. Buell's testimony that the costs of maintaining an IOLTA account are not passed to the clients, while the costs or maintaining a sub-account would be passed on. *Id.*

The district court concluded that "Plaintiffs have failed to present evidence of a loss. The Court finds that, based upon all the evidence before it, Mr. Summers's loss is zero." *Id.* at 643.

The trial in the Texas case, and the district court's extensive findings of fact, may explain Petitioners' decreased reliance on the argument WLF made to this Court in *Phillips* that "virtually all" clients suffer an actual economic loss as a result of IOLTA programs. To be sure, specific findings of fact concerning the Texas IOLTA program do not necessarily apply to the Washington IOLTA program. The outcome of the trial on remand in *Phillips* nevertheless casts serious

doubt on Petitioners' representations that Washington clients would benefit financially if their funds could be deposited elsewhere than an IOLTA account.

Furthermore, the Washington and Texas IOLTA programs share a key feature: if funds can be made to earn net interest for the client, then the lawyer (or Washington LPO) holding the funds is *prohibited* from placing the funds in an IOLTA account. 86 F. Supp.2d at 639; *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 858 (9th Cir. 2001) (en banc), *cert. granted*, 122 S. Ct. 2355 (2002). Thus, both programs are designed to assure that clients receive any net interest that is capable of being earned on their principal. If a particular client in Washington or Texas *does* suffer an economic loss, it is a result of lawyer error or an unforeseen change in circumstances, not the structure of the IOLTA program. In either case, clients are entitled to recover the "lost" interest.[4]

B. There is No Non-Economic Loss

Petitioners also assert that the IOLTA program deprives them of the right "to control the uses to which their property is put," and that this right has value even if that value is difficult to measure. Pet. Br. 37. As the record in the Texas case demonstrates, the *economic* value of this right is not at all difficult to measure – it is zero. At the Texas trial, Petitioners did not even attempt to establish that they were entitled to any specific amount of compensation for loss of such a right. *See* 86 F. Supp. 2d at 643 ("Plaintiffs failed to establish an actual number denominating Mr. Summers' loss."). This is hardly surprising, because the trial record in

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[4] Like Washington, Texas provides for refunds upon request of interest earned on IOLTA accounts in situations in which the client's principal could in fact have generated net interest. The trial record in *Phillips* shows that as of September 1999, TEAJF had received 22 requests for refunds, totaling $27,000. Tr. 224. All 22 requests were granted. *Id.*

Phillips established that IOLTA programs do not, in fact, deprive any client of the right to control the uses to which their property is put. Instead, the record established that the property owner makes an independent decision – separate and apart from IOLTA or any authority of the State – to hand over money to a lawyer in circumstances in which the money cannot earn interest for the client. Once a client makes that decision, the rules of professional conduct – again separate from IOLTA – require the lawyer to deposit the client's money in a demand account. And once the money is deposited with a bank, the federal and state banking laws – also separate from the IOLTA rules – allow the bank to use the money in any way it sees fit, subject only to a requirement that it repay the principal amount on demand.

Client trust funds, including both IOLTA accounts such as the account at issue in *Phillips* and non-IOLTA accounts, are "general" rather than "special" accounts for purposes of Texas banking law. This means that the depositor's right is contractual in nature, and is limited to repayment of the balance of the account on demand. These basic facts were established at the trial in *Phillips*. Indeed, they were acknowledged by the private attorney plaintiff in the Texas case:

> Q. [Y]ou would have no right to complain how the bank uses the bank's money once you made the deposits.
>
> A. I have no right to complain about how the bank uses the bank's money.
>
> Q. So if [the bank] wanted to take that principal and give it away to a controversial political cause that you disagreed with or your client disagree[s] with, you would have no right to complain about that.
>
> A. That's right.

Tr. at 90.

As is apparent from the above exchange, Petitioners' claim that they have lost an "intangible" right as a result of IOLTA is untenable. Property owners give up the "right to control the uses to which their property is put" before the IOLTA rules comes into play. Thus, they cannot fairly complain that the IOLTA program divests them of this right, or that they are entitled to monetary compensation for its loss. *See* 271 F.3d at 863.[5]

II. WHERE THE PROPERTY OWNER SUFFERS NO ECONOMIC LOSS, THE AMOUNT OF JUST COMPENSATION DUE IS ZERO

In the Texas case, the district court concluded that "[w]ithout an identifiable compensable loss, the Court finds there has been no taking without compensation in violation of the Fifth Amendment." 86 F. Supp. 2d at 673. On appeal, six judges of the Fifth Circuit agreed that "[j]ust compensation for zero is zero." 293 F.3d at 253; *see also* 270 F.3d at 195. The Ninth Circuit also agreed with this conclusion, which supplies one of the grounds for the Ninth Circuit's holding that the Washington IOLTA program does not violate the Just Compensation Clause. 271 F.3d at 862.

Petitioners have remarkably little to say about the Just Compensation issue; they devote only three paragraphs of a 48-page brief to it. *See* Pet. Br. 35-37. Petitioners' cursory argument does not dispute the "constitutional truism" that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Petitioners also do not deny

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[5] Even if Petitioners could show that they have lost a "right to control" the use to which their property is put, they cannot show that this right was "taken" in the constitutional sense, as explained in Part III below.

that the purpose of "just compensation" is to put "the owner of condemned property 'in as good a position *pecuniarily* as if [the] property had not been taken.'" *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979), *quoting Olson v. United States*, 292 U.S. 246, 255 (1934) (emphasis added). The relevant question, for just compensation purposes, is "What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.). Accordingly, where "nothing of value was taken," "[n]othing [is] recoverable as just compensation," even if "technically" there has been a "taking." *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280, 282 (1926).

Rather than confronting these principles, Petitioners seek to divert attention from them by asserting that the Ninth Circuit's decision rests on a "rationale rejected in *Webb's* [*Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980)], that a statutory seizure is permissible simply because it 'takes only what it creates.'" Pet. Br. 36. Petitioners misstate the Ninth Circuit's rationale. It is true that the government is not required to compensate property owners for value that is created by the government, and this rationale *does* support the Ninth Circuit's ruling. *See United States v. Fuller*, 409 U.S. 488, 492 (1973); *United States v. Reynolds*, 397 U.S. 14, 16 (1970). In this case, however, the Ninth Circuit rested its decision on the distinct principle that the purpose of the Just Compensation Clause is to put the property owner "in as good a position pecuniarily as if the property had not been taken." 271 F.3d at 861-62.

Webb's involved a substantial amount of principal, which indisputably was capable of earning and did earn a substantial amount of net interest. The property owner would have received the net interest but for the State's intervention. Thus, the property owner in *Webb's* clearly suffered a real economic loss as a result of the challenged rule. In this case, by contrast, the property owner *could not* earn net interest,

with or without IOLTA, and therefore the economic loss to the property owner is zero.

In a footnote, Petitioners – without citing any authority – deny that just compensation is determined by comparing their "purely economic situations" in the "pre-IOLTA" and "post-IOLTA worlds." Pet. Br. 36 n.14. Petitioners assert – without elaboration and again without citation of any supporting authority – that "[t]he compensation due here is exactly equal to the amount taken." Pet. Br. 36. Petitioners' assertions directly conflict with the principle that the purpose of just compensation is to put the property owner in as good a position pecuniarily as if the property had not been taken. That established approach to just compensation *requires* comparison of the claimants' economic situations (1) following the government's challenged action and (2) in the absence of the challenged action. Try as they may, Petitioners cannot escape the fact that their economic position is exactly the same in both cases.

Petitioners contend that the Ninth Circuit erred in its determination that injunctive relief was improper, asserting that they are entitled to an injunction shutting down the State's program in its entirety, despite their inability to prove damages. Pet. Br. at 38-43. But a successful claimant under the Fifth Amendment is entitled to compensation, not an injunction. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 & n.5 (1982). Compensation for the loss is more than just the preferred remedy. As this Court has repeatedly observed, in the absence of a denial of just compensation there is no constitutional cause of action. *Williamson County*, 473 U.S. at 194-95; *City of Monterey*, 526 U.S. at 710. This means that a plaintiff asserting a violation of the Just Compensation Clause must not only allege a compensable loss, but must seek compensation in the appropriate forum before submitting its constitutional claim to a federal court. *See*

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

The notion that a federal court injunction is available to a plaintiff who cannot prove a loss and has refused to seek compensation through available state processes – a notion that was adopted by the Fifth Circuit in the Texas case – overturns a century of Fifth Amendment jurisprudence. Justice Holmes' famous maxim in the *City of Boston* case would become "What has the owner lost? If nothing of economic value, proceed directly to federal court and obtain an injunction."[6]

Petitioners' reinterpretation of the Just Compensation Clause to mean that a gain to the government is unconstitutional even if there is no loss to a property owner has no grounding in the words or purpose of the Fifth Amendment. That Clause refers to the taking of "private property . . . for public use without just compensation." U.S. Const., Amdt. 5. As this language suggests, at the heart of the Clause lies a concern, not with preventing government action, but with providing compensation for action that takes "private property" and fails to compensate the property owner. "[The Takings Clause] is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church*, 482 U.S. at 315; *see also Eastern Enters.*, 524 U.S. at 545 (Kennedy, J., concurring in

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[6] The Fifth Circuit held that the Texas officials had conceded at an earlier stage of the litigation that they were "subject to [plaintiffs'] prospective injunction claims." 270 F.3d at 190. Judge Weiner in dissent contended that they "have done no such thing" and that there is "a vast difference between conceding that the Eleventh Amendment is not a *bar* to the assertion of a *claim*, on the one hand, and conceding *entitlement* to the *relief sought* by asserting a claim on the other." *Id.* at 196.

judgment and dissenting in part) (Takings Clause "has not been understood to be a substantive or absolute limit on the government's power to act. That clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge.").

Petitioners' attempt to write the "just compensation" language out of the Fifth Amendment is unsupported and unsupportable, for compensation is the essence of the constitutional protection. Even if a taking is considered "per se," it is still subject to a determination of what compensation, if any, is due. *See, e.g., Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1013 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (remanding for compensation determination). Because Petitioners do not, and cannot, establish any compensable loss of the sort that the Fifth Amendment was designed to protect, there can be no constitutional violation, and thus no right to a remedy of any kind, much less an injunction shutting down the entire IOLTA program.

III. IOLTA PROGRAMS DO NOT "TAKE" PRIVATE PROPERTY IN THE CONSTITUTIONAL SENSE

Petitioners devote most of their argument to an effort to persuade the Court to apply a per se analysis to the Washington IOLTA program. (Pet. Br. 17-30.) In arguing that the Court should apply per se takings analysis in this case, Petitioners are attempting to swim against a very strong current. This Court recently reaffirmed that "[t]he temptation to adopt what amount to per se rules in either direction must be resisted." *Tahoe-Sierra*, 122 S. Ct. at 1478, 1481 n.23, 1489 (citation omitted). In addition, the Court repeatedly has declined to apply per se takings analysis to required payments of money to the government. *See Eastern Enters.*, 524 U.S. at 529-30 (plurality opinion); *United States v.*

Sperry Corp., 493 U.S. 52, 62 n.9 (1989); *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., Inc.*, 508 U.S. 603, 643-44 (1993); *Bowen v. Gilliard*, 483 U.S.-587, 606 (1987); *Connolly v.* PBGC, 475 U.S. 211, 224 (1986).

Setting aside some flights of rhetoric, *see, e.g.,* Pet. Br. 21 (asserting that Washington's IOLTA program "perpetrates an . . . undisputed taking," even though the issue plainly is disputed), Petitioners advance two main arguments in an attempt to overcome the strong presumption against applying per se takings analysis.[7] *First*, they assert that the Washington IOLTA program is nothing more than "a simple appropriation of property from a small number of individuals." Pet. Br. 21. *Second*, they assert that "no rationale has been offered or can be offered for singling out those individuals to bear that burden." *Id.* Once again the factual record developed in the Texas case refutes Petitioners' arguments.

Petitioners' argument proceeds by disregarding the client's principal and considering the interest earned on that principal as the sole relevant property. In the "real world," Pet. Br. 33, of course, clients are likely to regard their principal as highly relevant. Indeed, since clients cannot realize any interest on their principal, with or without IOLTA, they are likely to be far more concerned about principal than interest – if they are concerned about interest at all.[8] If Petitioners' approach were adopted, property interests could always be defined in such a way that the

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[7] Notably, Petitioners abandon an argument that they made in the courts below: that this Court's decision in *Webb's* compels application of per se taking analysis.

[8] In *Phillips,* Petitioner WLF was able to find only a single client in all of Texas willing to join its lawsuit. In this case, none of the individual petitioners is a client of a lawyer.

government action in question takes 100% of the "relevant" property. This Court repeatedly has declined to chop up property interests in this way. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Concrete Pipe & Prods.*, 508 U.S. at 643-44; *Tahoe-Sierra*, 122 S. Ct. at 1483-84.

Petitioners' argument also depends on rigidly divorcing the IOLTA program from the rules of professional conduct that serve to protect client funds entrusted to a lawyer, as well as the system of banking laws and regulations that govern funds deposited in financial institutions. Thus, Petitioners sweepingly assert that the "burden" imposed by an IOLTA program "has nothing to do with the property owner's decision to utilize the legal system, or any other service for which a fee might arguably be charged." Pet Br. 27. *See also* id. at 22 ("burden" of IOLTA is imposed "capriciously" and "haphazardly"). Petitioners are incorrect, for several reasons.

IOLTA programs, including both the Washington and Texas programs, are designed precisely to avoid imposing *any* economic burden on clients. The trial in the Texas case established that the economic loss incurred by the plaintiffs in that case as a result of the IOLTA program is zero. As the district court explained in the Texas case, the plaintiffs "could not maintain they are being unfairly singled out to bear a burden, when they are in fact, bearing no burden at all. The IOLTA program costs Plaintiffs nothing. The governmental action in this case does not implicate fundamental principles of 'justness and fairness,' because there is no cost to Plaintiffs." 86 F. Supp. 2d at 646-47.

Nor can Petitioners reasonably complain that they are subjected to a *non*-economic burden, in the form of a "right to control the uses to which their property is put." Pet. Br. 37. As explained above, the IOLTA rules apply only *after* a client has given up the right to control the uses to which the

property is put, by handing over funds to a lawyer (or Washington LPO) to be deposited in a bank account. As shown by the trial record in the Texas case, the bank can make whatever use of the deposited funds it pleases, subject only to a contractual obligation to return the principal upon demand.

In assessing Petitioners' claim that they have lost "valuable, non-economic rights in their property" it is instructive to consider this Court's opinion in *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). In *Pruneyard*, the Court addressed an argument that a state constitutional provision took private property by allowing individuals to exercise rights of free expression at privately-owned shopping centers. In an opinion written by then-Justice Rehnquist, the Court acknowledged that "there ha[d] literally been a 'taking'" of the "right to exclude others," *id.* at 82 (internal quotations and citations omitted), and observed that this right is "one of the essential sticks in the bundle of property rights." *Id.* The Court held nevertheless that there was no taking in a constitutional sense, because the owners of the shopping center had "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" *Id.* at 84. In so holding, the Court emphasized that the property owners had opened the shopping center "to the public at large," and that they were able to "minimize any interference with its commercial functions." *Id.* at 83.

The Court's rationale in *Pruneyard* is applicable to IOLTA programs. With or without IOLTA, the funds at issue are voluntarily handed over to the client's lawyer and placed in a non-interest-bearing account. Thus, the client whose funds are placed in an IOLTA account has made a choice under which he or she never could exercise any "right to exclude" even before IOLTA. Nor, in the context of funds that would have been deposited in a non-interest-bearing account for the bank to enjoy their use value, has the client lost anything of

economic value. He or she would not receive any interest if the program did not exist. Here, as in *Pruneyard*, there has been no taking in the constitutional sense.

Not only are Petitioners wrong in asserting that IOLTA programs impose a substantial "burden" on property owners, they are also wrong that this alleged "burden" falls "capriciously" or "haphazardly" on some property owners but not others. Property owners subject to the IOLTA program are precisely those who have voluntarily entrusted their money, without any government compulsion, to a lawyer or LPO in circumstances in which the money cannot earn interest for the client. Thus, the program is organized in an entirely rational way to avoid imposing economic loss on *any* citizen.

Petitioners assert that IOLTA programs have no connection to a client's decision to entrust a lawyer or LPO with the client's money. *See* Pet. Br. 16 ("The IOLTA program involves no regulatory purpose of any sort. It simply sets out to raise large sums of money for governmental objectives . . . . The individuals thus singled out have no particular connection to the provision of legal services."); *id.* at 28 ("burden" of IOLTA "has nothing to do with the property owner's decision to utilize the legal system, or any other service for which a fee might arguably be charged"). Once again, Petitioners' assertion is incorrect. As Petitioners themselves acknowledge, each client whose funds are subject to the IOLTA rules has made a "decision to utilize the legal system." *Id.* There can be no serious dispute that a fee for use of the legal system is reasonably related to providing low-income persons with access to the legal system. States such as Washington and Texas have chosen to apply the IOLTA rules to a subset of those who decide to utilize the justice system, namely those who can participate at zero economic cost. That limitation (which burdens no one and benefits users of the justice system) does not alter the relationship between a client's decision to utilize the legal

system and a program that provides increased access to that system for low-income persons.

The trial record in the Texas case demonstrates that in Texas, the IOLTA program actually provides a direct benefit to many clients. The rules of professional conduct requiring lawyers to place client funds in a bank, segregated from the lawyer's own funds and available on demand, are intended to benefit clients. Banks do not provide their services for free, and in many cases – as it turns out, nearly 50% of the time in Texas – the bank's fees actually *exceed* the interest earned on client trust accounts. In these cases, the Texas IOLTA program *pays the excess fees*. *See* 86 F. Supp. 2d at 643 (citing trial testimony "stating that 46-47% of IOLTA accounts cause TEAJF to lose money and that TEAJF pays negative fees"). The trial record in the Texas case thus demonstrates that the Texas IOLTA program directly benefits clients, by ensuring that they receive the protection of the rules of professional conduct (funds deposited in a bank account, segregated from the lawyers' funds, and available on demand) at no cost. The facts thus belie Petitioners' sweeping assertions that the "burden" imposed by IOLTA programs "has nothing to do with the property owner's decision to utilize the legal system, or any other service for which a fee might arguably be charged." Pet. Br. 28.

* * * *

All 50 States and the District of Columbia have established some form of IOLTA program. The trial in the Texas case demonstrated that, in fact as well as in theory, IOLTA programs impose no economic or non-economic loss on property owners. IOLTA programs are designed to avoid imposing a burden on property owners, and may in fact benefit clients by absorbing the cost of excess bank fees. Petitioners have not sought compensation from the State of Washington, but instead have gone directly to federal court

seeking to enjoin the State's program. A decision striking down the Washington IOLTA program in these circumstances would depart significantly from principles of federalism and stretch the Just Compensation Clause beyond its proper limits, with consequences that may be difficult to foresee.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 01-1325

OCT 15 2002
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IN THE

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ET AL.,

Petitioners.

—v.—

LEGAL FOUNDATION OF WASHINGTON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR FORTY-NINE STATE BAR ASSOCIATIONS AND THE NATIONAL ASSOCIATION OF IOLTA PROGRAMS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the Just Compensation Clause of the Fifth Amendment, as applied through the Fourteenth Amendment, require the State of Washington to pay compensation for an alleged "taking" of funds through its IOLTA program, which does not result in any financial loss to the owner of those funds?

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INTEREST OF THE *AMICI CURIAE*[1]

The Legal Foundation of Washington administers an "Interest on Lawyers Trust Account" ("IOLTA") program. Essentially the same type of program has been adopted in every other State, as well as in the District of Columbia. Like all of the IOLTA programs, Washington's program operates on the premise that sums of money too small or held for too short a time to generate a return for their owners should not be shunted into non-interest-bearing trust accounts that benefit only the financial institutions holding these deposits, as occurred in the past. Rather, these otherwise unusable assets should be utilized to help pay for legal services to the poor. Petitioners' takings claim is consciously designed to extinguish such programs around the country.

With dramatic cutbacks in funding for the Legal Services Corporation, IOLTA programs have become a very important nationwide source for legal services to the poor. IOLTA programs collect revenue on IOLTA accounts and use this revenue to fund legal services to the poor. In recent years, as the Federal government's financial support for these services has declined and become more uncertain, legal aid societies have been able to draw upon the resources provided by IOLTA programs to continue their work. If petitioners succeed in disabling IOLTA programs, then the continued activities of non-profit organizations like these legal aid societies will be jeopardized. The consequent harm to those who lack the resources to have meaningful access to our courts is obvious.

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[1] This brief was not written in whole or part by counsel for any party, and aside from *amici curiae*, their members, and their counsel, no one made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Counsel for petitioners and respondents have consented to the filing of this brief. Letters evidencing such consent are on file in the Clerk's office.

The *amici curiae* that have joined this brief have a particular interest in the continued existence of IOLTA programs. The National Association of IOLTA Programs ("NAIP") is the coordinating umbrella organization for all of the state IOLTA programs. Its members are the fifty-one organizations that administer IOLTA programs in each of the fifty states and the District of Columbia. The forty-nine state bar associations, whose names are set out in the Addendum to this Brief, were involved in the creation of the IOLTA programs in their respective States and have helped sustain those programs since their inception.

The *amici curiae* represent, quite literally, the broadest possible cross-section of the American legal profession. Their participation here attests to the high regard that attorneys and other legal professionals have for the benefits and importance of IOLTA programs. For all the reasons stated, the *amici curiae* have a direct interest in the constitutional issues raised in this case, the resolution of which will dictate whether IOLTA programs will be able to continue to operate in every jurisdiction where they have been approved and implemented.

SUMMARY OF ARGUMENT

The Washington Legal Foundation has embarked on a longstanding and wide-ranging campaign against IOLTA programs, premised on a misunderstanding of the Constitution. The Just Compensation Clause of the Fifth Amendment does not, as the Washington Legal Foundation insists, prohibit all "takings" as a matter of law. Rather, it guarantees "just compensation" to people from whom the government takes private property. The clause actually *protects* the government's authority to take property for public use, as long as it provides fair and adequate compensation to the property owner.

All amounts deposited under the terms of the IOLTA program are funds that cannot yield a return on their own account. The program is expressly restricted to amounts that are too insignificant, or deposits that are too transitory, to yield any interest for the clients who own them. It is important to understand how IOLTA programs succeed in generating income where the individual deposits could not. This occurs, in the main, not because of banking regulations, tax charges, and other government provisions—as some courts have apparently been led to believe. Instead, IOLTA accounts operate by eliminating the considerable administrative charges involved in calculating, identifying, tracking, and allocating revenues to discrete individuals (whether in separate bank accounts for each client or pooled on a firm-by-firm or attorney-by-attorney basis). When these unavoidable costs are offset against the miniscule sums generated by small or short-term accounts, they preclude any actual return on an individual basis. Because of this central fact, which is undisputed in this case, IOLTA accounts generate income where there had been none before, and the income thus generated could never benefit any individual client.

Therefore, even assuming *arguendo* that the IOLTA program did somehow effect a "taking" of property within the meaning of the constitutional terms, that result is not accomplished without "just compensation." Under the two tests that the Court has applied to determine the amount of "just compensation" in different circumstances—the "fair market value" test and the "value to the owner" test—the amount of earnings on funds that are eligible for state IOLTA programs is zero. The Court has consistently rejected the application of a "value to the taker" measure for just compensation. Such a measure would compensate what is acquired, not what is taken, and thus would be directly inconsistent with the

text of the Takings Clause. Moreover, the Court has held in various contexts that the government is not required to provide compensation to the property owner for elements of the property's value that the government itself has created, which is obviously true of the IOLTA program itself. In sum, because petitioners have never suffered any compensable loss—*i.e.*, no loss with any monetary value—they have no valid constitutional claim under the Just Compensation Clause.

ARGUMENT

Attorneys receive money from their clients to escrow, or hold in trust, for all sorts of reasons. Attorneys put only some of this money in IOLTA accounts. Before depositing a particular client's fund in an IOLTA account, an attorney must go through a process to determine whether that deposit could either be deposited on its own or be pooled with other funds to earn an amount of interest sufficient to offset the expenses necessary to generate and distribute that interest to the client. The possibility of earning any net return—once the unavoidable costs of calculating, identifying, tracking, and allocating individual funds is taken into consideration—obviously depends on the projected time that funds will be held and available interest rates. An attorney may put into an IOLTA account only those funds that are not capable of generating any net interest for the clients who own them once the unavoidable costs of administering discrete revenue flows are offset against the interest they would be able to generate.

Therefore, none of the individual deposits placed in IOLTA accounts could generate interest on its own for an individual client, in view of applicable administrative charges, service charges, accounting costs, tax reporting costs, and banking restrictions. Because these funds are

either nominal in amount or held only for a short term (or both), there is simply no possibility that these funds would be able to earn any interest income that could benefit the individual clients for whom the funds are held. Once again, it bears emphasis that this central fact is undisputed in this case.

I. STATE IOLTA PROGRAMS ARE BASED SOLELY ON FUNDS THAT COULD NOT EARN INTEREST ABSENT THE IOLTA PROGRAM ITSELF.

A. IOLTA Programs Supplement Attorneys' Longstanding Fiduciary Duties To Keep Their Clients' Funds Safe and Separate.

Clients frequently ask attorneys (and, in Washington, LPOs), to hold their money in escrow or trust. Attorneys, as fiduciaries for their clients, have long been obliged to keep those funds safe and separate from their own funds. Washington, like every other State and the District of Columbia, has developed rules that regulate how attorneys handle their clients' funds. Washington's IOLTA program, like those adopted by each of the other forty-nine States and the District of Columbia, makes up but a small part of the regulatory framework that governs the treatment and disposition of client funds.

A lawyer is, in every sense of the word, her client's fiduciary. In this capacity, attorneys in this country have, for nearly two centuries, been understood to have three obligations when given money by a client: to keep their clients' money safe; to keep it separate from their own; and to provide an accounting of their clients' funds. David Hoffman in his early statement of rules for the legal profession discussed all three obligations. One of Hoffman's "fifty resolutions" stated: "I will retain no client's funds beyond the period in which I can, with

safety and ease, put him in possession of them." David Hoffman, *A Course of Legal Study* 762 (2d ed. 1836). Another stated: "I will on no occasion blend with my own, my client's money: if kept distinctly as his, it will be less liable to be considered as my own." *Id.*

These obligations have had a place in the canons, now rules, of professional ethics adopted by the American Bar Association ("ABA") since their first introduction nearly a century ago. The original Canons of Professional Ethics modified Hoffman's statement only slightly: "Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him." Canons of Prof'l and Judicial Ethics, Canon 11 (1908). The American Bar Association later refined this provision to bring it completely in line with Hoffman's original instruction: "Money of the client . . . should not under any circumstances be commingled with [the lawyer's] own or be used by him." Canons of Prof'l and Judicial Ethics, Canon 11 (1933).

These somewhat generally stated obligations became more specific in response to a directive from then-President of the ABA, Lewis F. Powell, Jr., to consider further amendments to the Canons. Disciplinary Rule 9-102 of the resulting Model of Code of Professional Responsibility ("ABA Code") preserved the prohibition on commingling. *See* D.R. 9-102(A) (1969). The Code added additional detail to the obligation to keep clients' funds safe. The Code required lawyers to deposit money received from a client in an identifiable bank account, maintained in the lawyer's name, at an in-state bank. *See* D.R. 9-102(A). The Code further demanded that lawyers notify their clients when they received funds from third

parties on their clients' behalf and to keep records relating to attorney trust accounts. *See* D.R. 9-102(B). When the ABA later replaced the Code with the Model Rules of Professional Conduct ("ABA Rules"), it preserved the requirements that attorneys place their clients' funds in bank accounts separate from their own, notify clients upon receipt of money from a third party, and preserve records related to attorney trust accounts for some period of years following termination of representation. *See* Model Rules of Prof.'l. Conduct, Rule 1.15 (1983).

Through these many iterations, these precepts were generally understood to require attorneys to generate interest for their clients whenever the deposits they held were able to do so. In 1962, the ABA's Standing Committee on Ethics and Professional Responsibility (charged with interpreting the ABA's Canon's of Professional Ethics) was asked whether attorneys could keep interest earned on commingled clients' funds when it was "quite difficult to allocate" the interest to particular clients. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Opinion 545 (1962). The committee answered that keeping the interest generated by the commingled sum would violate Canon 11. *Id.* The Standing Committee reiterated this point five years later when asked whether an attorney could use the interest generated on a commingled sum to defray the costs of setting up the account. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Opinion 991 (1967). The Standing Committee concluded that this arrangement would also violate Canon 11. *Id.* The Committee revisited these issues in 1982 in a formal opinion devoted to the issue of placing clients' funds at interest. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 348 (1982). There, the Committee explained that an attorney, as a trustee for his or her clients funds, "may be liable for lost earnings on funds left with [the attorney] for

investment and kept uninvested for an unreasonably long time." *Id.* at 149 (citing 2 A.W. Scott, *The Law of Trusts* §§ 180.3, 181 (3d ed. 1967 and Supp. 1981)). The Committee added that "an extreme violation of the lawyer's fiduciary duty to invest a client's funds . . . would provide a basis for professional discipline." *Id.*

Washington's Rules of Professional Conduct ("WRPC") mirror the ABA Rules. Attorneys have three primary obligations: they must hold their clients' funds separate from their own, keep those funds safe, and provide an accounting. *See* WRPC 1.14; Pet. App. 101a. Like the ABA Rules and the antecedent ABA Code, WRPC provide attorneys with a specific set of instructions about how to keep client funds safe and separate from their own. Attorneys must put client funds in one or more trust accounts. *See* WRPC 1.14; Pet. App. 101a. These trust accounts must provide for withdrawal on demand. *See id.* They must be held by "banks, savings and loans or depositary institutions insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, the Washington Credit Union Share Guaranty Association, or the Federal Savings and Loan Insurance Corporation." *Id.*

Washington's IOLTA program supplements these basic obligations. Under WRPC, an attorney who is given money by a client must determine whether that money can be used to generate net interest for the client. *See* WRPC 1.14(3); Pet. App. 101a ("In determining [where to put client funds], a lawyer shall consider only whether the funds to be invested could be utilized to provide a positive net return to the client, as determined by taking into consideration the following factors . . ."). If the funds are able to generate interest, then the attorney must put that sum into a trust account established specifically for that client or into a trust account that pools

money belonging to many clients with the lawyer or law firm calculating and paying interest to each client separately based on each client's activity in the account. WRPC 1.14(2); Pet. App. 101a.

If a particular sum *cannot* yield a return for the client through either of these means, then the attorney must place that sum into an IOLTA account. *Id.* The typical reason that a particular deposit cannot generate a return for the client, either in an account of its own or pooled with other sums of money given to that lawyer, is that the amount is too small, or the deposit is held for too short a time, to offset the administrative costs that are unavoidably necessary to calculate, identify, track, and allocate whatever miniscule amount of interest could be derived. Although IOLTA programs vary considerably from state to state, it is generally understood that attorneys who receive money from a client must, whenever possible, use that money to generate interest revenues for the client. Only funds that cannot yield a return for their individual client-owners may be put in IOLTA accounts.

B. The Mechanics of IOLTA Programs Eliminate the Possibility of Any Compensable Loss.

Outside observers, including some of the courts that have considered the challenges to IOLTA programs, have suggested that these programs annually generate millions of dollars through financial legerdemain or a "modern day attempt at alchemy." *See, e.g., Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 94 F.3d 996, 1000 (5th Cir. 1996), *aff'd, Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) ("*TEAJF I*"). This is simply not the case. Some amounts of money are simply too small or are held for too short a time to generate a return, once they are offset against the unavoidable administrative costs of calculating, identifying, tracking, and allocating

revenues to discrete sources of individual funds. Just as banks have historically combined the deposits of thousands of checking account depositors and earned much more on the combined sum than could possibly be earned on any individual deposit, IOLTA accounts combine, quite literally, millions of insignificant amounts of money and manage to generate millions of dollars when no return could be generated from any individual deposit.[2]

IOLTA programs work principally by eliminating the costs incurred to administer funds for each individual client and return discrete revenues to each such individual. The nature of this process is widely misunderstood, and this misunderstanding has generated much unfounded judicial skepticism. A more accurate and complete understanding of the mechanics of the IOLTA program is thus essential in order to resolve correctly the constitutional issues presented in this case.

IOLTA programs are not, as has often been suggested, mere beneficiaries of Depression-era banking regulations. Although federal law prevents corporations and partnerships from earning interest on money in checking accounts and bars them from putting money in NOW accounts, as petitioners observe, *see* Petitioner's Brief ("Pet. Br.") at 23-24, financial institutions have devised ways to pay corporations and partnerships interest on their demand deposits.[3] IOLTA programs do not gener-

[2] To take just one of many examples, in 2001, the Texas IOLTA program generated more than $5.6 million in interest on 17,890 accounts that pooled deposits from nearly 40,000 attorneys. *See* ABA, *IOLTA Handbook* at 88, 189 (2002). If each participating attorney averaged 25 IOLTA deposits in 2001, the Texas IOLTA program pooled just shy of 1,000,000 discrete deposits.

[3] Bank of America, for example, allows firms to sweep "excess funds" from a checking account into a money market account. By taking advantage of sweep accounts, corporations and firms can "earn competitive market returns." *See* Overnight Automated Sweeps, available at <<http://corp.bankofamerica.com/portal/portal/controller/controller.jsp?path=wcm/invst_sol/auto_ovngt_swps/content.xml>> (last visited October 1, 2002). Such services are not, of course, free. Charges to cover the administrative costs of such services typically run $150 per month or more. The case before the Court does not, of course, raise the issue because the client-plaintiffs in this case are both individuals, not corporations.

ate revenue because corporate and other deposits have no other interest-bearing vehicle available to them. Instead, IOLTA accounts create revenue by eliminating considerable, but often overlooked, transaction costs that prevent any net value from being returned to the owners of individual deposits.

The nub of the explanation is that it costs money to make money. Accounts must be opened. Deposits must be made. If funds are pooled and interest is to be allocated to each of the accounts making up a pool, transactions on each pooled deposit must be tracked, and the interest generated by the combined sum and the bank charges assessed against the account must be accurately allocated to each individual element according to its specific contribution to the total pool. The clients that earn interest must receive federal 1099 forms. Each of these unavoidable tasks must be performed in light of a particular bank's policies on deposit availability, check clearing and collection, minimum and tiered balance requirements, and interest compounding. Due to advances in information technology, these tasks take less time and effort than in the lead-pencil and paper-ledger past, but they still take *some* time and *some* effort. Accordingly, it costs a client money to have her attorney, someone working for her attorney, or the bank perform these tasks. For any given amount of money invested and interest rate earned, there is a period of time that is simply too short to generate enough revenue to cover the

administrative costs necessarily incurred to generate that revenue for any individual client.[4]

IOLTA accounts eliminate many of the transaction costs that make it impossible for a particular amount of money to generate any net return for an individual. Because the sums deposited into IOLTA accounts cannot generate revenue for the individual client, attorneys need not incur the costs of calculating, identifying, tracking, and allocating the interest generated by a pooled account to each of the constituent parts. Moreover, the IRS does not attribute the interest generated by IOLTA accounts to individual clients whose funds are deposited in such accounts, precisely because these revenues will not constitute income to the client. *See* Rev. Rul. 81-209, 1981-2 C.B. 16. This eliminates the additional expenses that would otherwise be associated with generating and distributing Federal tax forms.

Petitioners never even attempt to suggest otherwise. In a departure from the typical case raising a claim under the Just Compensation Clause, petitioners do not complain that Washington has wreaked on them any concrete financial loss by taking their property. Indeed, neither of the petitioners who can assert that his money ended up in an IOLTA account has shown any financial loss at all.

Petitioner Allen Brown predicates his claim on a deposit of $90,521.29 that he gave to Land Title Com-

[4] For example, at an annual interest rate of 2%, which is higher than the rate currently prevailing on money market or NOW accounts, *see, e.g.*, *Latest Interest Rates*, Bankrate.com, *available at* <<http://www.bankrate.com/brm/ rate/dep_home.asp>> (last visited Oct. 10, 2002), a $2,000 deposit will generate 77 cents in gross interest in 7 days. By contrast, the average fee for an interest-bearing checking account in the United States is $10.59 per month. *See Key findings from Bankrate's checking study*, Bankrate.com *available at* <<http://www.bankrate.com/brm/news/chk/ chkstudy/20020926b.asp>> (last visited Oct. 10, 2002).

pany in 1997. *See* J.A. 53, 130. Land Title Company apparently placed that deposit in an IOLTA account earning 1% interest, where it remained for only two days. Mr. Brown has not, however, presented any evidence that—with or without IOLTA—Land Title could have done anything to generate any interest income for him on his two-day deposit. When questioned on this topic at his deposition, he conceded as much, admitting that "without IOLTA in place, [he] may not have earned anything." J.A. 130. What this testimony fails to elucidate is that even *with* IOLTA *or some other pooling mechanism* in place, such a brief deposit as this one could not earn any revenue *after* the additional costs that would have to be incurred to segregate and track the individual revenues generated were offset against the minuscule amount of interest accrued.

Petitioner Gregory Hayes has likewise presented no plausible evidence of any compensable loss. Mr. Hayes bases his claim on a $1,000 deposit of earnest money that he gave to Fidelity National Title Company on August 14, 1996, along with an additional $6,396.66 that he gave to Fidelity on August 28—two days before his transaction closed on August 30. *See* J.A. 54. He has presented no evidence that, even absent IOLTA, Fidelity could have done anything with his individual deposits to generate any return for him, once the various administrative costs that would have to be incurred on his individual holdings were taken into account.

Notwithstanding the actual record in this case, the original panel of the Ninth Circuit baldly asserted that "it is not quite correct to say that IOLTA as structured does not deprive clients of any money." Pet. App. 77a. The panel did not cite any evidence to support this utterly erroneous conclusion. Instead, it assumed that attorneys, in the face of the very specific fiduciary duty

that they owe their clients, either botch the calculation of whether any given client deposit could be used to generate interest for the client or shirk the responsibility to make that decision altogether. *See id.* 78a. Without any support in the record, the panel surmised that "client[s] may lose an economically significant amount of interest . . . where the funds 'are expected to be' deposited for a much shorter period than they actually are." *Id.* The panel also assumed, again without any evidentiary support, that "[a]s a practical matter, [attorneys] have a substantial incentive not to be bothered with crediting clients with their interest," *id.*, even though such conduct would subject the attorneys to punishment under the disciplinary rules currently in effect in all of the States and the District of Columbia. The panel decision thus merely perpetuated petitioners' myth, without any factual basis, that IOLTA programs generate revenue through some mysterious and perhaps illicit means.[5]

The facts of the actual story are precisely the same, if somewhat better developed, in the parallel case of *Tex. Equal Access to Justice Found. v. Wash. Legal Found.*, U.S. No. 02-01, which is currently pending on petition for certiorari. As those petitioners have pointed out, the Texas case went to trial following remand from this Court's opinion in *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998). After a two-day bench trial, the district court found as a factual matter "that the only plaintiff with funds in a Texas IOLTA account . . . suffered no

[5] Even if there were a record to support the panel's conclusion on this point, any "taking" would result not from state action but from the decisions of private parties. *See* Brief for Respondents Legal Foundation of Washington and Its President at 32. In any event, IOLTA programs generally give refunds to clients whose money is deposited into IOLTA accounts in such situations. *See Tex. Equal Access to Justice Found. v. Wash. Legal Found.*, Trial Transcript at 224.

loss—zero. Indeed, Mr. Summers himself testified candidly and unequivocally to that fact." *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 270 F.3d 180, 198 (5th Cir. 2001) (Wiener, J. dissenting). Although a split panel of the Fifth Circuit reversed the decision of the district court to uphold the Texas IOLTA program in the face of claims under the First and Fifth Amendments, the panel majority did not disturb this finding on appeal, incorrectly deeming this critical fact to be irrelevant. *See id.* at 199 n.17.

II. EVEN IF THE IOLTA PROGRAM DID EFFECT A "TAKING" OF PROPERTY, THERE IS NO LACK OF "JUST COMPENSATION" AND HENCE NO CONSTITUTIONAL VIOLATION.

A. Any Takings Claim Requires a Compensable Loss Under the Just Compensation Clause.

IOLTA accounts do not deprive clients whose funds are placed in them of the opportunity to earn a return on those funds. As discussed above, with or without IOLTA, some amounts of money are simply too small or are held for too short a time to earn interest sufficient to pay for the unavoidable costs necessary to generate the interest for an individual client. Thus, even if the Court were to find that IOLTA programs did somehow effect a "taking" of property within the meaning of the constitutional terms, that result is not accomplished without "just compensation." The Court has consistently rejected the application of a "value to the taker" measure for just compensation, and under the two tests that the Court has applied to determine the amount of "just compensation" in different circumstances—the "fair market value" test and the "value to the owner" test—the amount of earnings on funds that are eligible for state IOLTA programs is zero. Moreover, applying Fifth Amendment protec-

tions to an asserted property interest that does not have any compensable value is not consistent with the purposes that underlie the Takings Clause—*i.e.*, to authorize the government to take property for public use in return for compensating the property owner for the value of property that was taken.

This Court has repeatedly held that the amount due a plaintiff under the Just Compensation clause is "what . . . the owner lost, and not what . . . the taker gained." *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913). Accordingly, the Fifth Amendment entitles a property owner to be "put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255 (1934). Because petitioners have not lost anything of any monetary value here, they have no valid claim under the Just Compensation Clause.

This conclusion is consistent with a long line of decisions by the Court that have explored and delineated the meaning of the "just compensation" requirement. Justice Holmes long ago summarized the proper test under this component of the Takings Clause as a determination of "what has the owner lost? not, what has the taker gained?" *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). The Court has linked this principle to the definition of the term "compensation," noting, for example, that "[b]ecause gain to the taker" may be "wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). The same principle inheres (to the owner's benefit) in the Court's determination of when a taking occurs, for it is "the deprivation of the former owner rather than the

accretion of a right or interest to the sovereign [that] constitutes the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-05 (1984).

Indeed, the facts of the *Boston Chamber of Commerce* case, in particular, bear a careful comparison to the facts underlying the IOLTA program. There the City of Boston exercised its power of eminent domain to lay out a public street upon a parcel of land. The ownership rights in this parcel were divided among several different parties—the Boston Chamber of Commerce owned the fee of the land; a wharf company had an easement of way, light, and air over the land; and a bank held a mortgage on the land, subject to the easement. *See* 217 U.S. at 193. These parties agreed to take the position in the resulting litigation that the value of the land taken should be assessed as an unrestricted fee. The City refused to assent to this claim, and noted that the easement considerably lessened the value of the underlying fee interest. It was ultimately stipulated by the parties that if the City prevailed in its view of the matter, the amount of just compensation for the parcel would be $5,000, whereas if the consortium of interests were to prevail, the price would be $60,000. *Id.*

The Massachusetts state courts held for the City, and this Court affirmed. It began by stating that the "only question to be considered is whether when a man's land is taken, he is entitled, by the Fourteenth Amendment, to recover more than the value of it as it stood at the time." 217 U.S. at 194. It noted that the complaining parties were seeking to have their property valued in a manner that presupposed the uniting of their distinct interests, even though it was highly unlikely and in any event not at all certain that this would ever have occurred without the government's exercise of its eminent domain authority. In a striking summary of the issue, therefore, the

Court observed that the real question was whether, *"by a simple joinder of parties after the taking, the city could be made to pay for a loss of theoretical creation, suffered by no one in fact."* *Id.* (emphasis added). The Court found this question to be easily answered in favor of the City, commenting that this "statement of the contention seems to us to be enough." *Id.*

The Court went on, however, to articulate more fully the rationale for this conclusion:

> [T]he Constitution does not require a disregard of the mode of ownership,—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is, what has the owner lost? not, what has the taker gained? We regard it as entirely plain that the petitioners were not entitled, as a matter of law, to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement.

217 U.S. at 195.

Applying this same analysis to this IOLTA program, it is clear that even if a "taking" were to be found, the amount of "just compensation" required to be paid to parties such as the petitioners here is zero. Under the rules governing the program, the funds deposited in the IOLTA accounts are either too small or are held for too brief a period to generate any interest income standing on their own. It is *only* the aggregation of these funds pursuant to the IOLTA program itself, and the consequent elimination of the costs necessary to attribute each increment of revenue to distinct individual sources, that

makes it possible to generate any income at all. As in the *Boston Chamber of Commerce* case, however, the complaining parties here are demanding that the courts assess their property interests in a manner that "disregard[s] the mode of ownership" and treats each distinct account as though it were part of an unencumbered whole when it has never been held, and would never be held, in this fashion apart from the IOLTA program itself. *See id.* at 195. Thus the real question here too is whether, "by a simple joinder of parties after the [assumed] taking, the [government] could be made to pay for a loss of theoretical creation, suffered by no one in fact." *Id.* at 194. Once again, the mere "statement of the contention" is more than enough to refute it. *Id.*

Likewise, in *City of New York v. Sage*, 239 U.S. 57 (1915), the Court held that the compensation due for a lot taken to build a reservoir did not include the enhanced value of the property "due to its union with other lots." *Id.* at 61. Rather, the owner's loss must be measured by the property's value distinct from the power of the government to make plots more valuable by combining them with others: "The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain." *Id.*; *see also United States ex rel. TVA v. Powelson*, 319 U.S. 266, 274, 280-85 (1943) (refusing to compensate landowner for value of his property when combined with other properties to facilitate hydroelectric project); *Olson*, 292 U.S. at 256 ("Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled.").

The same basic principles can also be gleaned from yet another series of decisions that are applicable here. The Court has long held that when the government effects a taking of property, basic fairness dictates that the government is not required to compensate the property owner for elements of the property's value that the government itself has created. In *United States v. Fuller*, 409 U.S. 488 (1973), for example, the federal government took a ranch from an owner who leased nearby land under the Taylor Grazing Act. The owner claimed that his ranch should be valued based on its potential use "in conjunction with" the grazing areas, but the Court rejected this claim. *Id.* at 489; *see also id.* at 499 (Powell, J., dissenting) ("compensation need not be afforded for an increase in market value stemming from the very Government undertaking which led to the condemnation"); *Powelson*, 319 U.S. at 266 (value created was business opportunity dependent on owner's privilege to use the state's power of eminent domain; no compensation required).

This longstanding principle extends at least as far back as *McGovern v. City of New York*, 229 U.S. 363 (1913). In that case, the City took title to various parcels of land in order to incorporate them as part of a reservoir. The complaining parties sought to recover as "just compensation" the enhanced value of the land when used for that purpose; in response, the City sought to limit compensation to the fair market value of each parcel at the time it was purchased. *Id.* at 371-72. This Court sided with the City. Again, a central tenet of its analysis was that there were "hundreds of titles to different parcels of that land," which were only "brought together by a taking under eminent domain." *Id.* at 372. The likelihood that this could have occurred by any other means "might be regarded as too remote and speculative to have any legitimate effect upon the valuation." *Id.* As a

result, the complaining party "was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be practical consideration and actually to influence prices." *Id.* (citing *Boston Chamber of Commerce*, 217 U.S. at 195).

If those same bounds are applied to the operation of the IOLTA program here, then any alleged "taking" of property would not be compensable because the individual client's funds are, by strict definition, incapable of generating income to any individual client net of administrative expenses, and any value derived from the funds is created solely by the operation of the IOLTA program itself, which eliminates the considerable administrative charges involved in calculating, identifying, tracking, and allocating miniscule sums generated by discrete funds. The likelihood that each individual client fund would be able to generate interest income, absent the implementation of the IOLTA program, is nil. The complaining parties thus are not entitled to claim the value of that "hypothetical possibility," whose manifestation in concrete form is solely attributable to the government's unilateral action. *McGovern*, 229 U.S. at 372.

Indeed, the problem goes even further in this case because, as explained above, even if individual client funds were aggregated with other funds, they could not generate income attributable to individual sources because of the transaction costs that must be incurred to calculate, allocate, identify, and track individual funds. "Because the fair market value of the earnings of IOLTA-eligible funds is $0, the client would be entitled to nothing." *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 106 F.3d 640, 644 (5th Cir. 1996) (denying rehearing and rehearing *en banc*) (Benavides, J., dis-

senting). Because these client funds would be unable to earn interest on their own, and the only "profit" previously derived from them had redounded to the sole benefit of someone other than the client (*i.e.*, financial institutions), both the value to the owner and the fair market value of these accounts is zero.

B. Having Lost Nothing of Any Value, Monetary or Otherwise, Petitioners Have No Valid Claim Under the Just Compensation Clause.

Petitioners have not shown that they have lost anything of value as a result of Washington's IOLTA program. Therefore, they do not have a valid claim under the Just Compensation Clause. Petitioners cannot resuscitate their claim by pointing out that IOLTA accounts in Washington succeed in generating revenue for the Legal Foundation of Washington or by claiming that they have valuable "non-economic" rights at stake.

As discussed above, a property owner with a claim under the Just Compensation clause is not completely forbidden to base her claim of compensation on the value that is created when her land is combined with the land of another. Such a claim is permitted, however, only "if the union of properties necessary is so practicable that the possibility would affect the market price." *Sage*, 239 U.S. at 61. Put slightly differently, in order to establish compensable value based on the combination of one's own property with another's property, the complaining party must show "a reasonable probability of the [property] in question being combined with other[s] . . . in the reasonably near future." *Powelson*, 319 U.S. at 275-76.

This possibility does not revive petitioners' claim here. IOLTA programs do not create value simply by pooling small amounts of money together. With or without the pooling of accounts, the sums of money placed in IOLTA

accounts simply could not generate any return for their owners, once the costs associated with calculating, identifying, tracking, and allocating those individual revenues to discrete sources are introduced into the equation. IOLTA accounts generate a return for their beneficiaries by eliminating the substantial transaction costs that would be incurred to calculate, identify, track, and allocate each constituent fragment of interest revenue to its original source in the funds of one or another individual. Put differently, with or without the aggregation accomplished by the IOLTA program, there remains absolutely no probability that individual clients could earn a return from the money that is placed in an IOLTA account.

Having no claim to have lost anything of value, monetary or otherwise, petitioners fall back to the proposition that they can invoke the Just Compensation clause to protect valuable "non-economic interests" in the interest income generated by IOLTA accounts. Although it is far from clear that these supposed "non-economic interests" can ever support a valid constitutional claim under the Just Compensation Clause, there is certainly no such thing as an alleged "non-economic interest" in pure money.

Money is simply a means of exchange. It has notational value, rather than intrinsic or sentimental value. The bundle of rights that an owner exercises over a particular sum of money—possession, use and disposition—has a precise economic value. The economic value of these rights is captured by the cost of the lost opportunity to invest that sum of money for any particular period of time. *See* Richard A. Brealey and Stewart C. Myers, *Principles of Corporate Finance* 11-12 (5th ed. 1996) (explaining that opportunity cost is calculated by "discount[ing] expected future payoffs by the rate of return offered by comparable investment alternatives"). In this

case, the value of the various sticks in the ownership bundle is worth precisely nothing. The amounts of money placed in IOLTA accounts cannot be used to generate any return for their client owners, and they thus lose nothing in having them taken away. Put simply, the right to possess, control, or dispose of $0 is worth exactly $0.

At bottom, petitioners have nothing more than an ideological objection to the continued existence of Washington's IOLTA program. *Cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 465 (1982) ("the psychological consequence presumably produced by observation of conduct with which one disagrees" is an insufficient basis to challenge conveyance of property). The Just Compensation Clause does not provide a legitimate vehicle for would-be conscientious objectors to government programs to vent their spleen. The animating purpose behind the Just Compensation Clause is not, as the Court has noted on many occasions, to limit government interference with private property but "rather to secure compensation" when a taking occurs. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987). It is apparent that the just compensation for a putative "loss" with no value is, and can only be, $0.

* * * * *

Finally, *amici* believe that this case cannot be decided in a vacuum, divorced from its important practical consequences. Over the past two decades, IOLTA programs have been implemented in every jurisdiction nationwide, at the behest of thousands of thoughtful attorneys, judges and legislators who have shaped and then blessed their implementation. Their operation is of increasing importance to assure the continued availability of legal

services to many deserving individuals and families who cannot afford to hire a lawyer on their own.

As Judge Benavides pointed out in a prior round of these IOLTA litigations, petitioners' claim threatens the very survival of these programs, which are "a primary source of funding for public interest legal organizations" at a time "when these organizations are already struggling for their lives financially." *Texas Equal Access*, 106 F.3d at 641-42 (Benavides, J., dissenting). Surely the public interest does not require the Court to sacrifice the substantial benefits of these innovative programs merely for the sake of extending doctrines of property law that were designed to apply in very different circumstances, and went only so far as to ensure that just compensation would be afforded for any monetary losses incurred. None of the core principles of the Court's takings jurisprudence would be threatened in the least by upholding the constitutional validity of the unique programs at issue in this case.

CONCLUSION

For the foregoing reasons, as well as those stated by respondents, the judgment below should be affirmed.

Respectfully submitted,

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The Arkansas Bar Association
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The Chicago Bar Association
The Colorado Bar Association
Connecticut Bar Association
Delaware State Bar Association
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Supreme Court, U.S.
FILED
OCT 18 2002
OFFICE OF THE CLERK

No. 01-1325

IN THE
Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, et al.,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American Bar Association ("ABA") is a voluntary membership organization of the legal profession dedicated to the promotion of a fair and effective system for the administration of justice. It has over 410,000 members, who come from each of the fifty states, the District of Columbia, and the U.S. territories.

One of the core functions of the ABA is to promote the ethical behavior of lawyers. The central ethical obligation of lawyers is to protect the interest of their clients, including any client property deposited with the lawyers. ABA Model Rule of Professional Conduct ("ABA MRPC") 1.15 (1997). Lawyers have an additional ethical obligation to improve access to justice for the poor. *See* ABA MRPC 6.1. The ABA views the future availability and effectiveness of IOLTA ("Interest on Lawyers' Trust Accounts") programs as essential to efforts to improve the legal system by broadening access to civil justice under MRPC 6.1, and consistent with the ethical obligation of lawyers to their clients under MRPC 1.15. It therefore files this brief in support of Respondents.

The ABA's historical involvement with IOLTA programs makes it uniquely qualified to assist this Court in gaining a full understanding of such programs and the bases for their widespread support from lawyers, as well as from

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[1] Letters of consent have been filed with the Clerk. No counsel for a party authored any part of this brief, and no one other than *amicus* and its counsel has made a monetary contribution to its preparation or submission. Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

the organized bar, state judiciaries and legislative bodies. For two decades, the ABA has supported the creation and maintenance of IOLTA programs in every state and the District of Columbia. The ABA formed an Advisory Board and Task Force on IOLTA in 1981. Two years later, the ABA Board of Governors officially approved state-authorized IOLTA programs. *See* Resolution, ABA Board of Governors (April 1983) (approving "in principle the concept of state programs, where authorized by the law of that state, for the use of interest on lawyer trust funds for the support of law-related public service activities"). Meanwhile, the ABA Standing Committee on Ethics and Professional Responsibility reviewed the ethical implications of IOLTA rules and concluded that participation in state-authorized IOLTA programs was consistent with lawyers' professional and ethical responsibilities, including in particular the ethical obligation of lawyers to protect their clients' property.[2] If the ABA believed that IOLTA programs in effect took money from or had an adverse economic impact on clients, as Petitioners assert, the ABA would vigorously oppose them.

Since the early 1980s the ABA has continued to support the adoption of IOLTA programs. After the success of early IOLTA programs, the ABA House of Delegates in 1988 resolved to encourage states to adopt or convert to mandatory IOLTA programs:

> BE IT RESOLVED, that the American Bar Association encourages each state which has a voluntary Interest on Lawyers' Trust Accounts (IOLTA) program to convert and adopt a comprehensive IOLTA program in which all lawyers in the state who are required to maintain trust accounts will be required to participate.

Resolution, ABA House of Delegates (February 1988). In 1991, the ABA House of Delegates reaffirmed its support for IOLTA programs:

> BE IT RESOLVED, that the American Bar Association reaffirms its support for state programs which generate interest on lawyers' trust account funds for the purpose of law-related public service to the poor.
>
> BE IT FURTHER RESOLVED, that funds generated by IOLTA programs should not be used as a substitute for public funding for obligations of government arising under the Constitution, statutes, or otherwise, and that the allocation of such funds should be determined in each state by an independent body, in light of that state's needs and priorities.

Resolution, ABA House of Delegates (February 1991). Today, the ABA operates a Commission on IOLTA and an IOLTA Clearinghouse, which together monitor and provide information about the operation of IOLTA programs across the country. Through the Commission, the ABA helps the states adopt rules and enforcement mechanisms to ensure that client funds are deposited in IOLTA accounts only if they can generate no net interest for clients.

STATEMENT

IOLTA programs nationwide represent a creative and legitimate means – carefully crafted by representatives of the legal profession and state governments – of stemming the

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[2] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 348 (1982).

decline of legal services available to the poor. State IOLTA rules provide for client funds to be deposited in IOLTA accounts only when they cannot generate net interest for clients as a result of bank fees or other transaction costs. By avoiding many of these transaction costs, IOLTA programs are able to generate net interest that is then used to fund nonprofit organizations that provide legal services to those in need – a result that even Petitioners concede is socially beneficial. Pet. Br. at 35.

After the introduction of IOLTA-like programs in several English-speaking jurisdictions around the world, Florida adopted the first United States IOLTA program in the late 1970s. *See In re Interest on Trust Accounts*, 356 So. 2d 799 & n.25 (Fla. 1978) (describing history of IOLTA programs in other countries). Thereafter, the Conference of Chief Justices resolved in February 1979 to endorse and encourage the development and implementation of IOLTA programs. *See* Conference of Chief Justices, *Interest on Trust Accounts*, Res. V (Feb. 13, 1979). Additional states and jurisdictions then began developing, adopting and refining IOLTA programs, and today these programs enjoy overwhelming support from state political and judicial bodies. All fifty states, the District of Columbia, and the Virgin Islands now have established IOLTA programs – by court rules in forty-seven jurisdictions and by state legislation in five. In promulgating and approving IOLTA rules, courts have acted with full knowledge of (and sensitivity towards) both the ethical obligations of lawyers and the limitations imposed by the Takings Clause in the federal Constitution and equivalent clauses in state constitutions.

Funds generated by IOLTA accounts are administered by bar foundations and independent nonprofit corporations, as well as through special programs established by the states, state supreme courts or state bar associations. Nationwide,

IOLTA programs generated approximately $162 million in 2001.[3] Income collected through each IOLTA program is distributed as grants. About 90% of the grants support either the provision of direct legal services or pro bono legal services to the poor. In 2001, these legal services grants were distributed to over 900 different programs, which provided assistance in a wide range of areas including housing, public benefits and consumer matters. Other IOLTA grants fund alternative dispute resolution programs, victim services, *pro se* litigation, young lawyers public service projects and loans and scholarships to law students.[4]

But even with IOLTA, our nation faces a crisis in serving civil legal needs, particularly of the poor. The ABA conducted a Comprehensive Legal Needs Study ("CLNS") throughout the 1990s to learn about the legal needs of Americans, what they do about those needs, and how satisfied they are with the outcomes. The CLNS study concluded that in the last twenty years, legal services to individuals and households have declined as a proportion of all legal services provided by the civil justice system.[5] The most frequently unmet needs relate to medical access and insurance, utilities, and public benefits.[6] Not surprisingly, economically disadvantaged segments of the population

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[3] American Bar Association, IOLTA Handbook 98 (2002).

[4] *See Civil Justice: An Agenda for the 1990s* (1989), *at* http://www.abanet.org/legalservices/downloads/sclaid/accessconf.pdf.

[5] *See* Albert Cantril, *Agenda for Access: The American People and Civil Justice* (1996), *at* http://www.abanet.org/legalservices/downloads/sclaid/agendaforaccess.pdf.

[6] *See* National Survey of the Civil Legal Needs of the Poor, *in* ABA Consortium on Legal Services and the Public, Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and the Public Generally 28 (1989).

suffer most acutely from a lack of access to civil justice. A 1989 study conducted by the Spangenberg Group revealed that approximately 80% of the legal problems of the poor go unaddressed.[7]

Because IOLTA funds represent the second largest funding source for the provision of legal services to the poor in this country, the situation would be worse still without IOLTA. According to a survey conducted by the ABA Center for Pro Bono in 1991, IOLTA programs fund approximately 26% of the budgets for bar association-sponsored pro bono programs. Indeed, the most recent statistics of the ABA Project to Expand Resources for Legal Services show that IOLTA revenues provide approximately 15% of funding for *all* legal services to the poor. The continuation of IOLTA is therefore of vital importance to the provision of needed legal services.

SUMMARY OF ARGUMENT

A. Because money is fungible, an alleged taking of money is categorically different from an appropriation of tangible personal or real property, to which a *per se* takings analysis may apply. Petitioners' claim that an appropriation of money must be evaluated as a *per se* taking runs counter to takings jurisprudence generally, which applies the multi-factor regulatory takings test even where governmental action has severe monetary impacts. Thus, the alleged taking here must be analyzed under regulatory takings principles, just as this Court has analyzed alleged takings of money in the past. As Respondents explain in their brief, such an analysis leads to the conclusion that the Washington IOLTA program does not effect a taking at all.

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[7] *See Civil Justice: An Agenda for the 1990s* (1989), *at* http://www.abanet.org/legalservices/downloads/sclaid/accessconf.pdf.

B. Even if a taking had occurred, no compensation would be due to Petitioners. It has long been settled that the measure of compensation under the Fifth Amendment is what the owner of the property has lost, not what the State has gained. Here, Petitioners have suffered no pecuniary loss. While Petitioners may have lost the right to exclude others from the use of the interest earnings on their deposits, such a loss in these circumstances has no economic significance for purposes of just compensation under the Fifth Amendment. In any event, Petitioners lost the right to exclude others from using interest earnings on their deposits not as a result of Washington's adoption of an IOLTA program, but as a result of their voluntary decision to deposit funds into escrow that could not earn net interest.

C. The fact that Petitioners are owed nothing in the way of just compensation resolves the case. Because the Constitution forbids only takings without just compensation, there can be no constitutional violation when no compensation would be due. Nothing in the Fifth Amendment or in takings jurisprudence supports Petitioners' notion that a taking of valueless property can be enjoined, while the taking of valuable property can proceed, subject only to the owner's right to seek compensation.

ARGUMENT

I. THE IOLTA PROGRAM DOES NOT IMPOSE A COMPENSABLE BURDEN ON ANY PERSON

The Court of Appeals correctly held that there are two independent reasons why the Washington IOLTA program does not violate the Takings Clause: the IOLTA rules do not effect a taking under the Fifth and Fourteenth Amendments, and even if they did, no compensation would be due.

A. The IOLTA Program Does Not "Take" Any Property From Clients.

The Court of Appeals correctly decided that the Washington IOLTA program does not "take" any property from clients. Thus, the ABA supports the arguments in Respondents' brief that regulatory rather than *per se* takings analysis applies here and that, under regulatory takings analysis, there is no taking. Because this brief focuses on the just compensation issue, however, its treatment of the takings issues will be confined to a few observations.

First, money is categorically different from physical property because it is fungible and because payment of money to government is a widely shared burden. As this Court wrote in *United States v. Sperry Corp.*, 493 U.S. 52, 59-64 (1989), "It is artificial to view" withdrawals of money "as physical appropriations of property. Unlike real or personal property, money is fungible." 493 U.S. at 62 n.9. The *Sperry* Court therefore rejected the argument Petitioners advance here – that "physical appropriation" of money is a *per se* taking. *Id.* Indeed, the Court consistently has analyzed appropriations of money under the multi-factor test applicable to regulatory takings.[8] *See Eastern Enters. v. Apfel*, 524 U.S. 498, 523-24 (1998) (plurality opinion) (compulsory payment of health care benefits to retirees);[9] *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 643-44 (1993) (employer's

[8] In *Sperry* itself, as in other fees for services cases, the Court truncated the traditional regulatory analysis, recognizing that the concerns underlying the Takings Clause are not implicated by such fees. 493 U.S. at 60-62.

[9] The other five Justices in *Eastern Enterprises* concluded that takings analysis was entirely inapplicable to the monetary liability at issue there. *See Eastern Enters.*, 542 U.S. at 540-41 (Kennedy, J., concurring); *id.* at 555 (Breyer, J., dissenting).

withdrawal liability to multiemployer pension plans); *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987) (mandatory assignment of child support payments to the state); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) (withdrawal liability to multiemployer pension plans); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980) (interest earned on interpleader fund).[10]

Second, treating every use of money as a *per se* taking cannot be squared with the regulatory takings case law generally. That case law recognizes that many property regulations diminish the monetary value of property, thereby effectively taking money out of the pockets of property

[10] Despite Petitioners' reliance on *Webb's* (cited in Pet. Br. at 30 & 33 n.12), the Court in that case explicitly discussed two of the three variables traditionally applied in regulatory taking analysis. The Court first considered whether the government had interfered with the claimants' investment-backed expectations, holding that they had "more than a unilateral expectation" with respect to the interest generated by the interpleader fund. 449 U.S. at 161. The Court skipped discussion of the second factor, severity of the economic impact, as no analysis of the economic harm imposed was needed because it was undisputed that the fund had generated net interest allocable to each claimant. *Id.* at 162. The Court then considered the third factor, the nature of the government interest, and found that the government had not asserted any regulatory interest whatsoever. Therefore, it concluded, the measure was little more than a forced contribution to general revenues rather than a measure to "adjust[] the benefits and burdens of economic life to promote the common good." *Id.* at 163 (quoting *Penn Central v. City of New York*, 438 U.S. 104, 124 (1978)). In reaching this conclusion, the Court reserved the possibility that it might uphold a statute that allowed a county to retain interest earned "where the interest would be the only return to the county for the services it renders," *id.* at 165, thus leaving no doubt that a regulatory takings analysis (rather than a *per se* approach) applied.

owners, or actually require owners to spend money to comply with the regulations. *See, e.g., Penn Central v. City of New York*, 438 U.S. 104, 124-27 (1978). But despite their monetary impacts, such regulations are not considered *per se* takings.

Third, treating every demand for money as a *per se* taking cannot be squared with the principle that taxes are virtually always permissible under the Fifth Amendmen. This principle applies not just to federal taxes, where Congress' power to tax is established by the Constitution, *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24-25 (1916), but also to state and local taxes, where the Constitution contains no similar grant of authority. *See, e.g., City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 at 375-76 (1974). Even if the IOLTA rule does not assess a tax, as Petitioners argue, Pet. Br. at 27, the fact that taxes do not constitute takings undercuts the logic of Petitioners' argument that all appropriations of property, including appropriations of money, are necessarily *per se* takings. *Cf. Penn Central*, 438 U.S. at 124 (contrasting "physical invasions" of property with programs "adjusting the benefits and burdens of economic life" and indicating that taxes fall in the latter category).[11]

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[11] Petitioner urges that taxes are somehow different because they are of legislative origin, while state judiciaries have promulgated most (but not all) IOLTA programs. Pet. Br. at 27 & n.9. But takings analysis does not generally depend on whether the legislature is the source of the alleged taking. And passage by a legislature does not guarantee that taxes will fall on a broader group of citizens than other appropriations. *See, e.g., Alco Parking Corp.*, 417 U.S. 369 (tax on parking lot owners). Moreover, even if the label "tax" has some talismanic significance, the limited differences between taxes and other appropriations of money could not justify treating taxes as exempt from takings analysis but other monetary appropriations as takings *per se*. Instead, as this Court has held, monetary appropriations must be subject to regulatory takings analysis.

Here, the Washington IOLTA program imposes less of a burden than most taxes or regulations, and is as broadly targeted as many. The State simply has regulated the use of certain funds, requiring that they be deposited in IOLTA accounts instead of noninterest bearing accounts. It then uses the resulting interest, which has no economic value to the owners, to fund a concededly laudable social goal. The absence of any tangible – or even material – burden on any person provides an ample "rational justification" for this approach to funding IOLTA programs. Pet. Br. at 19.

B. Even Assuming the IOLTA Program "Takes" Some Property Right From Clients, No Compensation Is Due Because That Property Has No Economic Value.

This Court has recently reaffirmed that a state's mere taking of "property" does not necessarily violate the Takings Clause. "[O]nly takings without 'just compensation' infringe [the Fifth] Amendment." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997). In *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), this Court recognized that IOLTA accounts might present a situation in which no compensation would be due even if a taking occurred. *See id.* at 172. The record here makes clear that is the case, for despite Petitioners' repeated references to the "burden" that IOLTA imposes on them, the simple truth is that they have not suffered any loss – economic or otherwise – that is compensable under this Court's takings jurisprudence. Thus, no constitutional violation has occurred.

1. Petitioners Are Not Entitled to Compensation Unless They Have Suffered an Economic Loss.

At its core, the requirement of just compensation assures that a property owner will be indemnified for the economic value of any property interest taken by the government. That value is generally determined with reference to the "market value" of the property. *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949). In assessing market value, courts look not to the value attributed to the property as a result of an owner's "unique need for property or idiosyncratic attachment to it." *Id.* at 5. Rather, the compensation required under the Fifth Amendment embraces "only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent." *Id.*

It is equally well settled that compensation under the Fifth Amendment is calculated exclusively from the property owner's point of view and excludes any special value that the government may have for the land or that it may add to the land by virtue of using its condemnation power. When there is a difference between the private property owner's "loss" and the government's gain, "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 319 (1987); *see also Kimball Laundry*, 338 U.S. at 5. If the taking itself generates value, therefore, that value is not properly considered in arriving at just compensation. *See United States v. Twin City Power Co.,* 350 U.S. 222, 228 (1956) (excluding special value to condemnor in assessing compensation); *United States ex rel. Tenn. Valley Auth. v. Powelson,* 319 U.S. 266, 276 (1943). As Justice Holmes wrote for the Court in *New York v. Sage,* 239 U.S. 57, 61 (1915), a city cannot be "made to pay for any part [of value] it has added to the land by thus

uniting it with other lots, if that union would not have been practicable or have been attempted except by intervention of eminent domain."

Under these principles, it is plain that just compensation for a taking is zero when the market value of the taken property is zero. When the transaction costs attendant to the individual owner exercising control over or making use of the property would exceed the economic benefits of doing so, the owner is not entitled to any compensation if the property is taken. The Court made this point in *United States v. Virginia Elec. & Power Co.* ("*VEPCO*"), 365 U.S. 624 (1961), where it considered how to value a taken "flowage easement," which had given a private power company the right to flood riparian lands for hydropower. The Court observed that if market forces "such as difficulty of assemblage of all necessary lands" made "it certain that the flowage easements would never be exercised by the . . . Power Company or its assigns," then "nothing" would be payable to the owner of the easements – even though the government would realize value by destroying the property right to build a reservoir. *Id.* at 634 (quoting *Augusta Power Co. v. United States*, 278 F.2d 1 (5th Cir. 1960)) (ellipses in original). Likewise, in *Powelson,* this Court denied any compensation to a landowner for the claimed "water power value" deriving from the possibility of constructing a hydroelectric dam on the owner's land because it would not have been "profitable" to construct and operate such a dam. 319 U.S. at 274.

This Court reached a similar conclusion in *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280 (1926), which involved an award for the seizure of a railroad during World War I. Although the Court assumed the railroad had been taken, it nonetheless denied the owner any compensation, reasoning that "[n]othing was recoverable as just compensation, because nothing of value was taken from

the company; and it was not subjected by the Government to pecuniary loss." *Id.* at 281; *see also Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 304 (1976) ("A number of factors, of course, could operate to eliminate the existence of compensable value in the leasehold interest."); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241-42, 257-58 (1897). Other courts also have found that governments owe zero compensation even for *per se* takings when those takings impose no net financial loss on the private owners.[12]

Petitioners are therefore plainly incorrect that every taking "violate[s]" the Takings Clause and must result in a remedy. Pet. Br. at 17. A taking requires only just compensation, nothing more. And where there is no economic value lost, just compensation is zero.

2. Petitioners Have Not Suffered an Economic Loss.

The Washington IOLTA program does not result in any economic loss. While this Court held in *Phillips* that the interest earned by Petitioners' funds is their private property, 524 U.S. at 172, the Court also recognized that "[t]he Federal Government, through the structuring of its banking and taxation regulations, imposes costs on" the interest "if private citizens attempt to exercise control over it." *Id.* at 171. For funds placed in IOLTA accounts, these transaction costs along with other transaction costs, by definition, *exceed* the

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[12] *See Unisys Finance Corp. v. Resolution Trust Corp.*, 979 F.2d 609, 612 (7th Cir. 1992) (Posner, J.); *California v. United States*, 169 F.2d 914 (9th Cir. 1948); *Fulmer v. Nebraska Dep't of Roads*, 134 N.W.2d 798, 800 (Neb. 1965). Denial of compensation is common where the federal government takes roads from states because the taking frequently imposes no financial burden on the states. *See, e.g., California v. United States*, 395 F.2d 261, 264-65 & n.8 (9th Cir. 1968) (collecting cases).

economic value of their property (*i.e.*, the gross interest) itself. In other words, regardless of Washington State's treatment of interest earned on IOLTA accounts, Petitioners could not have obtained those earnings themselves. Thus, the value of the interest to Petitioners is absolutely zero.

That the State has the ability to benefit from the interest earned on Petitioners' principal when deposited in an IOLTA account and combined with other similar interest earnings does not change the fact that clients cannot realize economic value from their funds on deposit. As in *Sage*, this means only that there is a divergence here between Petitioners' "loss" and the government's gain. But it is Petitioners' loss alone that matters, for the just compensation requirement demands only that the owner of taken property be put "in as good a position pecuniarily as if his property had not been taken." *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *accord Marion & Rye Valley*, 270 U.S. at 281 (test is whether the owner was "subjected by the Government to pecuniary loss"). Petitioners' suggestion that just compensation is equal to the value of the interest to the State, Pet. Br. at 17, 33, ignores this firmly established principle.

Because clients suffer no direct financial "loss" from the supposed taking of their interest earnings, Petitioners suggest they may have lost some indirect benefit from "earnings credits" that some Washington escrow companies received prior to IOLTA's implementation. *See* Pet. Br. at 36 n. 14. Even assuming Petitioners had lost the benefit of earnings credits, which Petitioners have not shown, and that such credits could be characterized as Petitioners' "property" (a proposition that goes far beyond the holding and rationale of *Phillips*), that loss would be related only indirectly to the alleged taking. The Takings Clause does not require states to compensate property owners for such indirect losses. Parties

to escrows would be worse off financially by reason of an IOLTA rule only if: (i) a bank accepting IOLTA deposits has decided to end a preexisting practice of offering earning credits; (ii) the cessation of those credits materially affects an escrow company's finances; and (iii) the escrow company decides to pass any resulting costs on to customers. That effect is too indirect and contingent to merit compensation under the Fifth Amendment. When the government takes property

> it must pay [the owner] for what is taken, not more; and [the owner] must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so, the consequences often are harsh.

United States v. General Motors Corp., 323 U.S. 373, 382 (1945). This Court thus has denied compensation for the destruction of a business as "an unintended incident of the taking of land," *Mitchell v. United States*, 267 U.S. 341, 345 (1924), and it has denied compensation to a condemnee who was required to purchase a "replacement facility . . . more costly than the condemned facility." *United States v. Fifty Acres of Land*, 469 U.S. 24, 34 (1984); *see also United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979) (*per curiam*) (reaffirming that "indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled"). So, too, even if Petitioners had shown an economic impact from the supposed loss of earnings credits, they would not be entitled to compensation under the Fifth Amendment for their loss.

3. The Interaction of Background Laws With IOLTA Does Not Alter the Economic Analysis.

Petitioners attempt to resurrect their claim by contending that Respondents' argument rests on the proposition that the government is seizing only what it has created. Pet. Br. at 32. But that is not Respondents' claim at all. Rather, Respondents argue (and the court below agreed) that the economic value of the interest to Petitioners is zero. And it does not matter that this is so in part because "[t]he Federal Government . . . imposes costs" on Petitioners' interest earnings if they attempt to extract them from their bank. 524 U.S. at 171. To begin with, the costs associated with the federal government's requirement of completing a 1099 income tax form and sending it out is only one reason that Petitioners' funds cannot generate net interest. Bank fees, accounting costs and other nongovernmental administrative expenses also make it infeasible to earn net interest on small or short duration deposits. *See generally* Amicus Brief of National Association of IOLTA Programs in Support of Respondents (describing expenses attendant to trust account administration).

In any event, the mere fact that Washington's IOLTA program operates within the framework of federal banking and taxation laws in no way obligates Washington State to compensate Petitioners for their inability to gain any economic benefit from their property under federal law. The State is a "separate sovereign" from the federal government. The State's actions, therefore, cannot be combined with federal action to create a constitutional violation. *Cf. Heath v. Alabama,* 474 U.S. 82, 88-89 (1985) (state and federal action cannot be combined to violate Fifth Amendment's Double Jeopardy Clause). Any assertions that Petitioners *might* have received interest payments under some nonexistent but hypothesized future banking system are

simply irrelevant under this Court's rule that such speculative losses are noncompensable. *See Powelson*, 319 U.S. at 274-76, 285 (disallowing valuation based upon hypothetical use of property where possibility of use was remote and speculative); *McGovern v. City of New York*, 229 U.S. 363, 372 (1912) (same).

Most fundamentally, this Court's takings jurisprudence does not allow Petitioners to value their property as if it existed in a vacuum free of all legal obligations. Petitioners pretend they can value the interest in IOLTA accounts as if that interest – unlike all other interest in bank accounts – could be reaped without tax reporting, transaction costs or other costs associated with banking regulations. Pet Br. at 17, 32-34 & n.13. But Petitioners cannot rest their case on a hypothetical world in which their principal could be placed in bank accounts free from the general rules and regulations governing our economy. Instead, the Court's basic rule that one must assess the value of private property according to its "market value," *Kimball Laundry*, 338 U.S. at 6, means that *valid, preexisting governmental regulations* must figure into the amount of just compensation due. *See* 26 Am. Jur. 2d Eminent Domain § 319 & nn.36-39 (2002) (citing numerous cases for proposition that "existing zoning classifications and restrictions should be taken into consideration, since the availability or nonavailability of such land for particular uses affects its market value"). This is why this Court denied compensation in *United States v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 312 U.S. 592 (1941), for destruction of property along a navigable stream. Because the common law had long given the federal government the right to flood such land to improve navigation, the government's common law right had destroyed the land's market value before it was ever condemned.

By the same token, if the State took a parcel of real property that had long been subject to certain federal land use regulations, the owner would be entitled only to the amount for which he could have sold that land to another private party with those federal regulations in place. *See Kirby Forest Indus. v. United States,* 467 U.S. 1, 10 (1984) (just compensation is measured by "what a willing buyer would pay in cash to a willing seller at the time of the taking") (quoting *564.54 Acres,* 441 U.S. at 511); *United States v. Commodities Trading Corp.,* 339 U.S. 121, 124 (1950) (measuring market value of taken property in light of governmental price ceiling in place at time of seizure, even though property would have been worth more absent that ceiling); *United States v. 174.12 Acres of Land,* 671 F.2d 313, 314-16 & n.3 (9th Cir. 1982) (land must be valued in light of environmental laws that limit development).[13] To calculate the value of the owner's land unmoored from such background legal obligations would lead to the impermissible result that property would be worth more when condemned than when the owner still has possession of it.

This is not to say, of course, that the government may enact regulations imposing prohibitive transaction costs on the use of property and then later take the property without affording the owner any compensation. Property owners may challenge such regulations themselves under the Takings Clause, and courts will invalidate them if they impose a substantial economic impact without sufficient governmental justification. *See, e.g., Penn Central,* 438 U.S. at 124. In addition, if governmental regulations unfairly impose transaction costs on some entities but not others, the

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[13] This Court in *Powelson* recognized that even land use regulations that are not yet in place may affect the measure of just compensation if they would be "an appropriate exercise of police power" and are likely enough to be enacted to "affect[] present values." 319 U.S. at 284.

disfavored class may invoke equal protection principles in opposition to the regulations. But here, Petitioners do not contest the validity of the federal government's banking or taxation regulations, and Respondents have no control over those regulations. That being the case, the Court must assess the value of Petitioners' interest against the backdrop of the federal government's exercise of its traditional regulatory powers.

4. Any Abstract Right to Control or Exclude Others From Obtaining the Interest in Funds Placed in IOLTA Accounts Lacks Compensable Value.

Unable to point to any financial loss inflicted by IOLTA, Petitioners insist that IOLTA imposes nonpecuniary losses on clients. They assert that they have lost important – even if "not easily quantif[iable]" – rights to control their property and to exclude others from it. *See* Pet. Br. at 37, 35. Although this Court noted in *Phillips* that these intangible rights are "valuable rights that inhere in the property," 524 U.S. at 170, the Court acknowledged that "the interest income at issue here may have no economically realizable value to its owner," *id.*, and did not discuss whether the Fifth Amendment requires compensation for loss of the intangible rights to control and exclude. A review of this Court's takings jurisprudence shows that a loss of these rights is not compensable and reveals that, even if it generally were, Petitioners surrendered those rights independent of any State action under the IOLTA program.

a. The rights to control and exclude others from property generally lack any compensable economic value.

The loss of the right to exercise dominion over one's money is not a compensable loss under the Fifth Amendment. It bears repeating that the constitutional mandate of just compensation requires a monetary payment sufficient to compensate only for the owner's *financial* loss. An owner is to be put "in as good a position *pecuniarily* as if his property had not been taken." *564.54 Acres of Land*, 441 U.S. at 510 (emphasis added) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *see also United States v. Reynolds*, 397 U.S. 14, 16 (1970) ("'[J]ust compensation' means the full *monetary* equivalent of the property taken.") (emphasis added). No decision from this Court has ever awarded monetary compensation for the loss of a purely noneconomic right.

This prerequisite of a pecuniary loss forecloses Petitioners' loss-of-dominion claim. This Court repeatedly has held that although the rights to retain possession of one's property and to exclude others from it are important sticks in the bundle of property rights, neither has any automatic economic value. In *Commodities Trading Corp.*, for example, the owner argued that it should be compensated for the fact that the government's seizure of its property deprived it of its "'right to hold' [its property] until [it] wanted to sell." 339 U.S. at 125-26. This Court, however, refused to award compensation for this "retention value" on the ground that it was too speculative and would lead to "haphazard" calculations untethered to any market value. *Id.* at 126-28. In *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), this Court held that a state's literal taking of the right to exclude individuals from a private shopping mall was not compensable because that right was not "essential to the use

or economic value of their property." *Id.* at 84. Finally, the owner's flowage easement discussed in *VEPCO* undoubtedly included the right to exercise some dominion and control over the riparian lands, but the Court made clear that the loss of this right was not compensable if the easement itself lacked any positive economic value. *See* 365 U.S. at 634. There is no reason to break new ground here.

At the very most, Petitioners, by virtue of the IOLTA rule, have lost their right "to let their principal lie fallow," that is, "the right to place the principal in a noninterest-bearing checking account" and thus ensure that it earns nothing. *Washington Legal Found.*, 271 F.3d at 863. But that right has no market value. *See Washington Legal Found. v. Texas Equal Access to Justice Found.*, 293 F.3d 242, 248, 254-55 (5th Cir. 2002) (Wiener, J., dissenting from denial of rehearing en banc). Even in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), in which the state physically appropriated a landlord's property and, by doing so, confiscated "the landlord's interest in . . . insisting that some negligible unoccupied space remain unoccupied," this Court declined to hold that any compensation necessarily was due for the loss. *Id.* at 437 n.15, 441 (internal quotation omitted). That compensation issue turned on whether loss of the right to exclude diminished the worth of the property compared with identical property with the cable lines installed. *See id.* Here, loss of the right to let interest lie fallow does not change its market value, as that value was zero to begin with.[14] Put another

[14] As we have shown above, this Court has repeatedly held that just compensation is zero when no economic value is lost even when real property is taken, and many lower courts have followed this principle. At least one lower court has suggested, however, that a plaintiff may recover nominal damages when it proves the State has taken economically valueless real property rights from it. *See St. Genevieve Gas Co. v. TVA*, 747 F.2d 1411, 1414 (11th Cir. 1984). Even if this decision is correct, it is distinguishable. The loss of dominion and control over a unique and tangible object, such as real property, is different from a loss of control over something fungible, such as money. *See Unisys Finance Corp.*, 979 F.2d at 612 (loss of worthless security interest does not entitle owner to any compensation).

way, the market would not place positive economic value on the right to prevent others from accessing interest that the owner could not himself access.

Indeed, ordering monetary compensation solely for Petitioners' alleged loss of the right to let interest earnings lie fallow would contravene the fundamental rule that just compensation is calculated with reference only to objective losses of property value and would open the floodgates to takings claims based on purely abstract losses. Due to "the need for a clear, easily administrable rule governing the measure of 'just compensation,'" *Kirby Forest,* 467 U.S. at 10 n.15, this Court consistently has emphasized that "just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner." *Fifty Acres of Land*, 469 U.S. at 35; *accord Kimball Laundry,* 338 U.S. at 5. Even assuming Petitioners have a special, subjective value for keeping the State from creating and using the otherwise inaccessible interest from their escrowed funds, that value is not subject to objective quantification and, hence, is not compensable.

Nothing in the Just Compensation Clause's insistence on objective measurements, of course, undermines the concept that "property is more than economic value." *Phillips*, 524 U.S. at 170. On the contrary, this Court's decisions acknowledge that subjective, individualized factors often cause individuals to value their property more highly than its objective worth. *See, e.g., Kirby Forest,* 467 U.S. at

10 n.15. Yet these cases simultaneously hold that such considerations – important as they are – are too imprecise to warrant remuneration for their loss:

> The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. *As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.*

Kimball Laundry, 338 U.S. at 5 (emphasis added). Thus, while there is no doubt that positive economic value is not essential to property ownership, or even to a person's valuing their property highly, positive economic value is the *sine qua non* of entitlement to compensation under the Fifth Amendment.

Petitioners' analogy to a letter or family heirloom does not change this fact. Pet. Br. at 37. While government would be precluded altogether from taking a letter or family heirloom if doing so served no "public purpose," as the Takings Clause requires, or its action was so arbitrary as to violate the Due Process Clause, a government taking that survived such scrutiny would be subject to the same method of valuation as is used in every other case. Indeed, Petitioners do not even suggest an alternative method of valuation. Nor do they explain why noneconomic value should be considered in valuing a letter or heirloom when it is routinely excluded in valuing an individual's home or land

for just compensation purposes. Simply put, the mere loss of dominion over property with no pecuniary value is not compensable.

b. Petitioners surrendered their rights to control and exclude others from their interest earnings independent of any State action under the IOLTA program.

Finally, even if the right to exercise dominion over property were itself compensable under some circumstances, it would not matter here, for Petitioners would not have been able to invoke that right even in the absence of IOLTA. Petitioners voluntarily placed their funds into escrow, knowing they would be deposited in banks. In the absence of IOLTA, the funds would have been deposited in noninterest bearing accounts because they were too small to earn net interest.[15] The depository banks therefore would have had the right to pool Petitioners' funds with the funds of other depositors, invest those funds, and dispose of the resulting earnings as the banks saw fit. The banks even could have donated a portion of their profits from investing Petitioners' principal to the Legal Foundation of Washington – without asking Petitioners for permission. Thus, irrespective of the IOLTA program, Petitioners gave up their right to dominion

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[15] When Petitioners argue that certain individuals have been "singled out" to bear the burden of the IOLTA program, Pet. Br. at 16, 22-23, they are referring to the fact that, under program rules, client funds may be deposited in IOLTA accounts only if they cannot generate net interest for the clients themselves. In other words, the clients who are "singled out" are those for whom IOLTA programs will have no adverse economic impact and impose no burden at all. The ethical responsibilities of lawyers to their clients require this limitation, which is one of the virtues of IOLTA programs.

or control over the profit that might accrue on deposits too small to return net interest to them.

Moreover, even if clients generally could prevent a private nonprofit organization from obtaining the interest on their principal, individuals have no such "'right to hold' [their property] as against a Government taking." *Commodities Trading Corp.*, 339 U.S. at 126. And once the State takes funds, it may use them for any legitimate public purpose it chooses. As Justice Kennedy recently explained for a unanimous Court:

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other extractions binding on protesting parties.

Board of Regents of the Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 229 (2000). If Petitioners believe otherwise, they may pursue their First Amendment claim. But the Fifth Amendment exists only to ensure compensation for objective losses, not to protect against any symbolic harm from allegedly compelled association.

In the end, it must be remembered that "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as its does from technical concepts of property law." *United States v. Fuller*, 409 U.S. 488, 490 (1973) (citation omitted). As the Court observed in another takings case, "there would be no justice in paying for a loss suffered by no one in fact." *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913). That is the case here.

II. NO INJUNCTIVE RELIEF IS AVAILABLE HERE BECAUSE THE STATE HAS NOT DENIED ANYONE JUST COMPENSATION

Petitioners' inability to establish any compensable loss is fatal to their request for an injunction against Washington's IOLTA program. Any discussion of remedies under the Takings Clause must begin with the fundamental principle that the Constitution permits the government to take private property for public use so long as it pays just compensation. "As its language indicates, and as the Court has frequently noted, [the Fifth Amendment] does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English*, 482 U.S. at 314. Consequently, "no constitutional violation occurs until just compensation has been denied." *Williamson County Reg'l Planning Com. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 n.13 (1985). Because Washington owed no just compensation here, no constitutional violation has occurred. As Judge Wiener explained in his Fifth Circuit dissent:

> [t]he very fact of their inability to prove compensatory monetary loss should end the case, not trigger a search for alternative equitable remedies. The absence of value means, quite straightforwardly, that the appropriation of the plaintiffs' property in this case is not proscribed by the Fifth Amendment.

Washington Legal Found., 293 F.3d at 254 (Wiener, J., dissenting from denial of rehearing *en banc*). Thus, the fact that Petitioners' property had no value means that Petitioners are not entitled to any form of relief, injunctive or otherwise.

Moreover, even if this Court were to conclude that Petitioners' property had been taken and that just

compensation was not zero, Petitioners would not be entitled to an injunction. Rather, they would have to seek compensation. As a general rule, injunctive relief is not available "when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984).[16] Such is the case here. This Court's decision in *First English* leaves no doubt that, so long as a state waives its sovereign immunity, as Washington has done, the Fifth Amendment itself directly affords the ability to bring a suit in federal court for the Takings Clause's textually dictated remedy – compensation. 482 U.S. at 315-17.[17]

There is only one potential exception to this rule, but it offers no help to Petitioners. In a case involving a federal (not state) taking, a plurality of this Court has stated that when "every dollar" taken by the government would be refunded in a suit for just compensation, making it "utterly pointless" for the government to take the money, the presumption is that a Tucker Act remedy is unavailable and that an injunction is therefore the proper remedy. *Eastern Enters. v. Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion)

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[16] Justice O'Connor, concurring in part and dissenting in part, did not question the relevant portion of the Court's analysis. *Id.* at 1021. Every Justice participating in the case agreed that injunctive relief was impermissible.

[17] Petitioners claim that a federal remedy is inadequate as it leaves states "free to continue practices found to violate the Takings Clause simply because they are willing to pay damages." Pet Br. at 47. But the Takings Clause simply is not "violated" so long as just compensation is available. Moreover, if this Court were to conclude that the IOLTA program constituted a taking and nonzero compensation was owed, a remedy would be available in the Washington courts. If such a remedy was unavailable previously, it was because the Washington Supreme Court Justices believed no compensation was owed.

(internal quotation omitted). But this is not the position in which Petitioners find themselves. Even if this Court were to agree with Petitioners that they are entitled to *some* compensation, there is no plausible argument that Petitioners' loss could be measured by the exact amount of interest gained by the IOLTA program.[18] Thus, it would not be "utterly pointless" for the state government to take the interest and require Petitioners to seek compensation, for the government would gain more than it paid in compensation – as it has the right to do.

But the greater obstacle to Petitioners' claim is that no compensation is owed, so no injunction can issue. Petitioners object that every taking must have a remedy and thus an injunction must be available where compensation is not warranted. That would lead to the absurd result that individuals may block takings of economically valueless property but may not prevent takings of extremely valuable property. An individual could stop the government from using interest in an IOLTA account but could not stop the government from taking his home. An individual could stop the government from taking an heirloom worth nothing but could not stop the government from taking an heirloom worth $1 or $1 million, and which had great sentimental value. Such a perverse rule is not the law.

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[18] Indeed, even the dissenters in the Ninth Circuit recognized that Petitioners' loss could not be measured simply by the amount of interest gained by the IOLTA program. *See* 271 F.3d at 881-82. Those judges suggested, as do Petitioners in certain places, that compensation could be calculated according to lost "earnings credits" and/or the right to exclude others from their property. But neither these items nor nominal damages would be equivalent financially to the amount of Petitioners' interest earnings.

Petitioners' discussion of remedies, in sum, seeks legal relief in a situation in which there is no constitutional violation. But just as there can be no right without a remedy, *see, e.g., Marbury v. Madison,* 1 Cranch 137, 162-63 (1803), there can be no remedy without a right.

CONCLUSION

For these reasons, the ABA respectfully requests that the Court affirm the decision below.

Respectfully submitted.

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No. 01-1325

Supreme Court, U.S.
FILED
OCT 18 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,

Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus curiae City and County of San Francisco urges the Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit that the Washington IOLTA program does not effect a taking. San Francisco supports the arguments of respondents and other *amici* that these claims do not fall into the "relatively rare" and "easily identified" *per se* category of physical occupations of private property, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1479 (2002), and that these claims also fail under the test of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) based on the facts and circumstances of this case. This brief, however, focuses on the second issue on which the Court has granted *certiorari*: the potential remedy if a taking had occurred.

While petitioners acknowledge the general rule that injunctive relief is not available to remedy an alleged taking, they contend that they are entitled to seek injunctive relief in this case. They principally argue that (1) the Court should assume that the Washington Supreme Court would not have intended for the disciplinary rules at issue in this case to stay in effect if the rules were found to effect a taking, and (2) they are entitled to seek injunctive (and compensatory) relief in this federal court case because it would have been futile for petitioners to seek compensatory relief in Washington state court. The Court should reject both arguments because they contradict longstanding Court precedent and basic, important limitations on the scope of the Takings Clause. Petitioners also suggest that they are entitled to an injunction because the disciplinary rules are "arbitrary." The Court should reject that

theory because the Takings Clause is not a proper constitutional basis for challenging arbitrary or other wrongful government conduct.

ARGUMENT

I. MONEY DAMAGES IS THE EXCLUSIVE REMEDY FOR A TAKING.

The plain language of the Takings Clause, "... nor shall private property be taken for public use without just compensation," U.S. Const. amend. V, requires that payment of compensation, not equitable relief, be the sole remedy for a taking. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). Monetary compensation is the appropriate remedy for a taking, whether the claim involves real or personal property, money, or any other type of property. The Takings Clause is a "peculiar[]" constitutional provision insofar as it

> requires just (*i.e.*, full) compensation, *see, e.g.*, *United States v. 564.54 Acres of Monroe and Pike County Land*, 441 U.S. 506, 510 (1979) (owner must be put "'in as good a position pecuniarily as if his property had not been taken'"); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893) ("[T]he compensation must be a full and perfect equivalent for the property taken"). . . .

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 748 (1997) (Scalia, J., concurring).

Before *First English*, certain courts, including the California Supreme Court, ruled that money damages were not available for violations of the Takings Clause. *See*

Agins v. Tiburon, 598 P.2d 25, 30-31 (1979), *aff'd*, 447 U.S. 255 (1980). The property owner's only legal recourse was to ask a court to invalidate the government action. In *First English*, this Court overruled the California Supreme Court:

> [The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation."

482 U.S. at 314-15 (emphasis original, citations omitted).

Based on this reasoning, the Court determined that if a regulation effects a taking of property, then the government may either rescind the regulation or leave it in place. If the government elects to rescind the regulation, then the government must pay just compensation for the temporary taking of the property from the date the government imposed the regulation until its removal. *See id.* at 318-20 & n.10; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 n.17 (1992). If the government chooses to leave the regulation in place, then it must pay the owner just compensation for the permanent taking of the property. *See First English*, 482 U.S. at 318-20; *Tahoe-Sierra*, 122 S.Ct. at 1482 ("*First English* was certainly a significant decision, and nothing that we say today qualifies its holding.").

Thus, *First English* teaches that money damages for a taking are mandatory. 482 U.S. at 314. Invalidation of the regulation is not a constitutionally adequate remedy, and, indeed, is not a remedy available to the plaintiff at all. *See id.* at 321; *see also Tahoe-Sierra*, 122 S.Ct. at 1482 (once taking has been established, "no subsequent action by the government can relieve it of the duty to provide compensation") (quoting *First English*, 482 U.S. at 321). The *First English* rule is consistent with this Court's earlier decision in *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986 (1984), where the Court held that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking." *Id.* at 1016; *accord United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990).

II. PETITIONERS FAIL TO ESTABLISH AN EXCEPTION TO THE RULE THAT EQUITABLE RELIEF IS NOT AVAILABLE FOR A TAKING.

A. Equitable Relief is Not Available on the Theory that the Government Would Not Have Intended to Maintain the Program If It Knew that a Taking Would Result.

Petitioners acknowledge the general rule that equitable relief is not available to enjoin an alleged taking. But petitioners contend that the Court should recognize and apply an exception to this general rule, on the theory that it would be "utterly pointless" to require the government, in a case involving the alleged taking of money, to refund

money it has taken. Brief for Petitioners at 40. Petitioners contend that a legislature – or, in this case, the Washington Supreme Court – should be presumed to have intended for the monetary appropriation to be halted, rather than be required to pay compensation, if its regulation were deemed a taking. Petitioners are mistaken for two reasons.

First, petitioners' exception would swallow the rule. They contend that it would be "utterly pointless" to require them to seek compensation. But in every regulatory takings case, it equally could be contended that it would be "pointless" to enter a judgment requiring the payment of compensation. Whenever the government adopts a police power regulation, whether directed at real property or personal property, it is operating on the assumption that it can proceed without paying.

In *First English*, the Court emphasized that the government has the option of rescinding a regulation determined to effect a taking, reflecting the theory that the government might well not wish to enforce a regulation if it effects a compensable taking. But the Court did not suggest that requiring the government to take positive action to reverse the taking and avoid the obligation to pay compensation was an unnecessary or "pointless" exercise. Likewise in this case, it would not be pointless to require the Washington Supreme Court to rescind the disciplinary rules to avoid the obligation to pay compensation, if a taking had been established.

Second, petitioners wrongly rely on *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998), to support their contention that the Court already adopted the proposed exception. Petitioners read too much into that case. *Eastern Enterprises* involved the constitutionality of the

Coal Industry Retiree Health Benefit Act. The Act required coal mining companies to pay money into health care funds for the benefit of their former employees. A four-justice plurality concluded that the Act worked a taking because it imposed an extreme, retroactive financial burden on the claimant. *Id.* at 529-37.

Petitioners rely on the plurality opinion. Brief for Petitioners at 45, citing plurality opinion in *Eastern Enterprises,* 524 U.S. at 519-22. But the five justices who did not join in the plurality opinion concluded, on several different grounds, that the allegations by the plaintiffs did not support a viable taking claim. *Id.* at 545 (Kennedy, J., concurring and dissenting); *id.* at 554-55 (Breyer, J., dissenting).[1] Because these five justices concluded that the Takings Clause did not even apply, it can hardly be inferred, as petitioners contend, that these justices implicitly acquiesced in the plurality's conclusion about what type of remedy would have been available if a taking had occurred. Brief for Petitioners at 39 and n.18. In fact, Justice Kennedy explicitly repudiated any such implication in advance. *See id.* at 547 ("Given my view that the takings

[1] The Federal Appeals Courts have uniformly followed the views expressed by the majority in *Eastern Enterprises*. *Commonwealth Edison Company v. United States*, 271 F.3d 1327 (Fed. Cir. 2001), *cert. denied*, 122 S.Ct. 2293 (2002) (["F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. We agree with the prevailing view that we are obligated to follow the views of that majority."); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir. 1999), *cert. denied*, 528 U.S. 963 (lower courts "are bound to follow the five-four vote (in *Eastern Enterprises*) against the takings claim. . . ."); *Kitt v. United States*, 277 F.3d 1330, 1336-37, *mod. on other grounds*, 288 F.3d 1355 (Fed. Cir. 2002) (same).

analysis is inapplicable in this case, it is unnecessary to comment upon the plurality's effort to resolve a jurisdictional question despite little briefing by the parties on a point which has divided the Courts of Appeals.") Thus, *Eastern Enterprises* does not support petitioners' exception to the general rule.

Indeed, the reasoning of the five justices in *Eastern Enterprises* undermines the analysis of the plurality on the remedy issue. As highlighted by petitioners (at 41), the plurality pointed to the fact that, in several prior cases involving alleged takings of money, the Court had assumed the availability of injunctive relief, citing, among other decisions, *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), and *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211 (1986). However, Justice Kennedy, in his concurring opinion, and the four dissenting justices strongly suggested that these decisions were incorrect insofar as they treated the claims as raising viable takings issues. *See* 524 U.S. at 547 (Kennedy, J., concurring and dissenting) ("These authorities confirm my view that the case is controlled not by the Takings Clause but by well-settled due process principles respecting retroactive laws."); *id.* at 555-56 (Breyer, J., dissenting) (also dismissing *Concrete Pipe* and *Connolly* as authoritative takings precedents). Because a majority of the Court has repudiated these decisions as takings precedents, they hardly can be invoked to demonstrate a general practice of making equitable relief available in this type of case.

The plurality in *Eastern Enterprises* also pointed to *Babbitt v. Youpee*, 519 U.S. 234 (1997) and *Hodel v. Irving*, 481 U.S. 704 (1987) as instances in which the Court

granted equitable relief in takings cases without discussing the claimant's obligation to seek compensation. But *Babbitt* and *Hodel* merely imply that equitable relief is available without directly addressing the issue. Nor do these decisions acknowledge the Court's contrary precedents. *See First English*, 482 U.S. at 314; *Ruckleshaus*, 467 U.S. at 1016; *Riverside Bayview Homes*, 474 U.S. at 127-28; *Preseault*, 494 U.S. at 11.

B. The Asserted Unavailability of Compensation in State Court Does Not Transform the Type of Relief Available for a Taking in Federal Court.

Petitioners' second basis for arguing that equitable relief should be available in this case is that the Ninth Circuit determined that it would be futile to pursue compensation in the Washington State Courts. *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 851 (9th Cir. 2001), *cert. granted*, 122 S.Ct. 2355 (2002). As a result, according to petitioners, they are entitled to sue in federal court and to seek both compensatory relief and equitable relief in this forum. In other words, petitioners contend that by moving a takings claim from state court to federal court, petitioners have been empowered to seek a broader array of relief than they would be entitled to seek in state court. The argument is wrong and should be rejected.[2]

[2] San Francisco questions the Ninth Circuit's conclusion that pursuit of just compensation in the Washington State Courts would be "futile." *See, e.g., Austin v. City and County of Honolulu*, 840 F.2d 678, 681 (9th Cir. 1988), *cert. denied*, 488 U.S. 852 (1988) (to go directly to

(Continued on following page)

Petitioners confuse choice of forum with choice of remedy. Under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985), a claim for compensation is not ripe for consideration in federal court so long as state procedures for obtaining compensation are available. On the other hand, if compensation is unavailable or inadequate, the claimant may sue for compensation in federal court, assuming that the claim is otherwise ripe under *Williamson County's* final decision requirement and the claimant satisfies other jurisdictional requirements. *Id.* at 196. To this extent, assuming that petitioners are correct that compensation for a taking in the state forum is unavailable, they would be entitled to proceed with the case in federal court.

On the other hand, the opportunity to sue for a taking in federal court does not somehow transform the relief available. Petitioners cite no precedent to support their interpretation of the interplay between state and federal court jurisdiction with respect to takings claims. And the argument contradicts "[t]h[e] basic understanding of the . . . [Takings Clause] that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 315 (emphasis original).

federal court, takings claimant must show that it "may not obtain just compensation through an inverse condemnation action under any circumstances . . . ."); *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991) ("[I]t must be certain that the state *would* deny that claimant compensation were he to undertake the obviously futile act of seeking it.") (emphasis original). Whether this case was improperly filed in federal court, however, is not at issue in this appeal.

The petitioners' claim to equitable relief is based in part on the Ninth Circuit's confused decision in *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998). *See Washington Legal Foundation*, 271 F.3d at 851 (citing *San Remo Hotel* for the right to file takings claim directly in federal court where state compensation remedy is inadequate); Brief for Petitioners at 44 (same). In *San Remo Hotel*, the Ninth Circuit decided that a claimant asserting a facial claim that a regulation fails to "substantially advance legitimate state interests" need not exhaust state compensation remedies and may proceed directly to federal court. That ruling was based on the Ninth Circuit's assumption that a substantially advance claimant may elect injunctive relief rather than money damages. *Id.* at 1101-02 ("denial of just compensation is irrelevant" for purposes of state compensation requirement). No other Circuit Court of Appeals has adopted this novel proposition.

San Remo Hotel is flawed for three reasons. First, as discussed below in Part II.C., in light of the reasoning of the five-justice majority in *Eastern Enterprises*, it is clear than an allegation that a government action fails to substantially advance legitimate state interests states a claim under the Due Process Clause, not the Takings Clause. Second, *San Remo Hotel*'s reasoning directly conflicts with this Court's many pronouncements that the sole remedy for takings is monetary compensation. *E.g.*, *First English*, 482 U.S. at 314. Third, opening the federal courts to takings claimants who fail to exhaust state compensation remedies is flatly inconsistent with *Williamson County*, which requires *all* takings claimants to exhaust state compensation remedies before proceeding to federal court under the Fifth Amendment. 473 U.S. at 195

("[B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.").

The *San Remo Hotel* panel's error in permitting property owners to skirt the state compensation requirement for facial "substantially advance" claims can be traced to that court's reliance on *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1998). *Sinclair Oil* in turn mistakenly relied on *Yee v. City of Escondido*, 503 U.S. 519 (1992). *See Sinclair Oil*, 96 F.3d at 407. In *Yee*, this Court held that a facial takings challenge to mobilehome rent control was ripe under the *final decision* prong of *Williamson County*. *Id.* at 534; *see Williamson County*, 473 U.S. at 186. *Yee* did not address the *state compensation* ripeness prong of *Williamson County*, nor was that issue before the Court. The Court granted *certiorari* in *Yee* after the plaintiffs had exhausted their state compensation remedy in a state court action. *Id.* at 525-26.

Petitioners' reliance on *San Remo Hotel* for the right to elect an equitable remedy for a takings claim is therefore misplaced. Both petitioners' position and the Ninth Circuit policy to allow equitable relief for certain types of takings claims should be rejected.

C. An Injunction is Generally Appropriate Relief for "Arbitrary" Government Action, But a Claim Under the Takings Clause Is Not Available for Arbitrary Action.

Petitioners also appear to argue that they are entitled to injunctive relief under the Takings Clause because the disciplinary rules at issue in this case are "arbitrary." As a general matter, San Francisco does not dispute that "arbitrary" government actions are subject to judicial injunctions in appropriate cases, taking into account the normal degree of deference courts owe the other branches of government. The fundamental problem with petitioners' argument for injunctive relief (assuming the claim of arbitrariness could be substantiated), however, is that an arbitrary government action may violate some other provision of the Constitution, or some other provision of law, but it cannot constitute a taking.

The Court resolved this issue in *Eastern Enterprises*. In that case, Justice Kennedy concluded that the Coal Industry Retiree Health Benefit Act was "arbitrary" and had to be "invalidated as contrary to essential due process principles." 524 U.S. at 539. On the other hand, precisely because the suit involved an allegation of arbitrary action, he concluded that the Takings Clause did not apply. Justice Kennedy acknowledged that the Court had sometimes indicated a taking can occur if the government action does not "substantially advance legitimate state interests," *see, e.g., Agins v. City of Tiburon*, 447 U.S. at 260, but observed that "[t]his sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act." Based on his reading of the Court's "equivocal" precedents, he

opined "that we should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible." Justice Kennedy concluded by observing that, because "the constitutionality of the Coal Act appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." 524 U.S. at 545-46.

In dissent, Justice Breyer and three other Justices agreed that review of the arbitrariness of government action is governed by the Due Process Clause instead of the Takings Clause. Like Justice Kennedy, they agreed that: "[T]he plurality views this case through the wrong lens. The Constitution's Takings Clause does not apply." *Id.* at 554 (Breyer, J., dissenting). These four justices emphasized that "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for legitimate government action that takes 'private property' to serve the 'public' good." *Id.* There is "no need to torture the Takings Clause" to accommodate claims of arbitrariness because these issues have a "natural home in the Due Process Clause, a Fifth Amendment neighbor." *Id.* at 556.

To be sure, the following year in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court upheld a takings award based on jury instructions that included the "substantially advance" formulation, but that decision cannot be read to repudiate the conclusion reached by a majority of the Court in *Eastern Enterprises*. The defendant city in *Del Monte Dunes* waived any objection to the jury instructions incorporating

the substantially advance test, and therefore the Supreme Court ruled that the city had no standing to challenge the test. *Id.* at 721-22. Thus, the fact that the Supreme Court upheld the finding of a taking in *Del Monte Dunes* has no precedential significance.

Furthermore, a careful reading of the different opinions in *Del Monte Dunes* demonstrates that the decision actually reinforces *Eastern Enterprises*. No member of the Court spoke in defense of the ostensible substantially advance takings test. In addition, five of the justices either wrote opinions, or joined in opinions, expressly reserving the question of the validity of the substantially advance test, indicating that the result in the case should not be taken as an endorsement of the test. *See* 526 U.S. at 732 n.2 (Scalia, J., concurring) ("As the Court explains, petitioner forfeited any objection to this standard, . . . and I express no view as to its propriety."); *id.* at 753 n.12 (Souter, J., dissenting) ("I offer no opinion here on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments.").

In sum, *Eastern Enterprises* remains the last clear statement by the Court on whether allegations of arbitrary government action can support a viable takings claim. *Del Monte Dunes* supports (and certainly does not undermine) the conclusion that the substantially advance test is not a legitimate takings test. Petitioners should not be entitled to sue for any type of relief under the Takings Clause on the assumption that the disciplinary rules were arbitrary, because allegations of arbitrary government conduct do not state a takings claim.

III. BECAUSE PETITIONERS HAVE NOT SUFFERED ECONOMIC HARM THAT CAN BE COMPENSATED WITH MONEY DAMAGES, THEY ARE NOT ENTITLED TO RELIEF UNDER THE TAKINGS CLAUSE.

The foregoing analysis of the proper remedy for takings claims informs the issue of whether the IOLTA program effects a taking. It would be anomalous to find that a regulation constitutes a taking where the exclusive remedy for this type of constitutional violation is not appropriate based on the facts of the case.

Petitioners have suffered no harm that can be compensated by money. Only the petitioners who deposited money with attorneys or escrow companies have standing to claim that the IOLTA program has taken their property: the interest on their deposits. *See Washington Legal Foundation*, 271 F.3d at 847 (only petitioners who deposited money with title companies have standing to sue for a taking of the interest on their deposits). Because the program does not receive interest from accounts where the interest would exceed the administrative costs and bank fees, but for the IOLTA program, petitioners' principal would not generate any interest for petitioners. *See* Joint Appendix ("JA") 149; Washington Rule of Professional Conduct 1.14(c)(2) and (4); Washington Supreme Court Admission to Practice Rule 12.1(c)(2)(iii). Moreover, petitioners presented no evidence in the courts below that they have incurred higher escrow fees as a result of the IOLTA program. *See* JA 50-52, 87-88, 96-97, 100, 119, 121, 124, 131-33 (deposition testimony showing that petitioners have no evidence that escrow companies raised rates after IOLTA rules adopted). In fact, if petitioners were to be

paid compensation through this takings action, they would receive a windfall; they would receive interest that, absent the IOLTA program, they would not earn.[3]

As demonstrated above, the exclusive remedy for a taking is money damages. The IOLTA program of Washington did not damage petitioners in a manner that can be compensated with money. Accordingly, the IOLTA program cannot effect a taking of petitioners' property.[4]

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[3] Petitioners also derive a "reciprocity of advantage" from the IOLTA program that offsets the small amounts of interest they claim was taken from them. *See Tahoe-Sierra*, 122 S.Ct. at 1489 (rejecting takings challenge to land development moratorium imposed on all similarly situated property owners, in part because regulation conferred reciprocal benefits on all property owners so burdened in the form of enhanced property values). The advantages to petitioners and the scores of other depositors who participate in the program are several. The IOLTA program promotes equal access to justice. Thus, the program benefits petitioners by enhancing the integrity of and public confidence in the legal system. The program also protects clients' funds from misuse by their attorneys and escrow officers.

[4] After arguing at great length that they are entitled to pursue both injunctive and monetary relief in federal court, petitioners cryptically suggest that, in view of the States' Eleventh Amendment immunity, they should at least be entitled to pursue equitable relief alone. Brief for Petitioners at 47 n.23. Petitioners are correct in asserting that the states are immune from claims under the Takings Clause based on the Eleventh Amendment. *See Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 94 F.3d 996, 1005 (5th Cir. 1996), *cert. denied*, 521 U.S. 1121 (1997); *see generally* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 137 (1999) ("The United States Supreme Court, while adopting the view that the Just Compensation Clause is self-executing with respect to compensation, has never held that the Clause abrogates . . . sovereign immunity."). However, petitioners are incorrect in their assumption that because a claim for compensatory relief is barred, they

(Continued on following page)

CONCLUSION

The Court should affirm the decision of the Court of Appeals for the Ninth Circuit.

Dated: October 18, 2002

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should be permitted to seek an injunction in the alternative, for the Eleventh Amendment "does not merely constitute a defense to monetary liability . . . , it provides immunity from suit." *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S.Ct. 1864, 1877 (2002). Ultimately, however, it will be unnecessary for the Court to address the contours of Eleventh Amendment immunity in this case because petitioners have an adequate – indeed exclusive – compensation remedy in state court, *see* fn. 2, *supra*, and, in any event, petitioners have failed to establish any type of injury sufficient to demonstrate a taking.

(19)

Supreme Court, U.S.
FILED
OCT 17 '02
OFFICE OF THE CLERK

No. 01-1325

In The

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, et al.,

Petitioners,

vs.

LEGAL FOUNDATION OF WASHINGTON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CONFERENCE OF CHIEF JUSTICES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Conference of Chief Justices consists of the highest justice or judge in each of the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands. The purpose of the Conference of Chief Justices is to provide an opportunity for consultation among the highest judicial officers of the several States, commonwealths, and territories, concerning matters of importance in the operation of state courts and judicial systems. The goal of the Conference is to improve the administration of justice.

The case of *Washington Legal Foundation v. Legal Foundation of Washington* involves a direct challenge to an initiative by the States to improve the quality and equality of justice in state courts. All fifty States, the District of Columbia, and the Virgin Islands have adopted an Interest On Lawyer Trust Account (IOLTA) program, the ultimate purpose of which is to generate funding for improved delivery of legal services to the poor. While there are minor variations in IOLTA programs from State to State, the essential premise is the same – nominal or short-term client deposits in lawyer trust accounts, which by themselves are incapable of generating interest in excess of the banking costs of account management, can be pooled into fewer accounts thereby reducing banking costs and earning interest in excess of costs. The interest is earmarked for the nonprofit IOLTA foundations, which fund legal services for the poor.

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[1] This brief has been exclusively authored by counsel for *amicus curiae* as indicated on the cover of the brief, none of whom is an attorney for any of the parties to this litigation. There was no monetary contribution to the preparation or submission of this brief made by any person or entity other than the *amicus curiae*.

IOLTA programs, for the most part, were initiated by the highest court of each State. Even in the five States where IOLTA was a product of legislative rather than judicial action, the Conference of Chief Justices has a strong interest in the continuance of the program because of IOLTA's contributions to the administration of justice. The Conference voted unanimously to authorize the filing of this *amicus curiae* brief at its meeting on July 30, 2002. This *amicus curiae* brief is being filed with the written consent of all parties.

SUMMARY OF ARGUMENT

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), the Court explained that a Fifth Amendment Takings Clause analysis ordinarily involves an ad hoc inquiry that focuses particularly on the following factors: 1) the economic impact of the challenged regulation on the claimant; 2) the extent to which the regulation interferes with distinct investment-backed expectations; and 3) the character of the governmental action, including whether the challenged public program is merely adjusting the benefits and burdens of economic life in order to promote the common good. In the present case, all of the *Penn Central* factors heavily support respondents' argument that the State of Washington's IOLTA program does not constitute a taking.

First, the State of Washington's IOLTA program imposes no economic burden on those individuals whose lawyer trust account deposits[2] are pooled in an IOLTA account. The only trust account deposits that are eligible for pooling in an IOLTA account are those which are too

[2] All of the arguments in this brief apply equally to trust account deposits or escrow deposits. For ease of reference, we use the term "trust account" to include all such deposits.

nominal or too short-term to earn interest for the client. *See, e.g.*, Washington Rule of Professional Conduct 1.14(c). Thus, the interest generated by IOLTA accounts, and earmarked for state efforts to afford equal justice, is interest that the various owners of the pooled monies could not, and would not, generate on their own. The net economic impact of IOLTA programs on such individuals, therefore, is zero. The present case stands in sharp contrast to *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 156-58 (1980), where the Takings Clause claimant deposited $1.8 million into an interpleader fund for nearly a year, a deposit that was neither nominal nor short-term, and which therefore was independently capable of generating interest for the depositor.

Second, Washington's IOLTA program does not interfere with reasonable investment-backed expectations. To be worthy of constitutional protection, an individual's expectations must be "based on objective rules and customs that can be understood as reasonable by all parties involved." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring). Moreover, "reasonable expectations must be understood in light of the whole of our legal tradition." *Id.* The sources of a client's reasonable investment-backed expectations regarding monies deposited into a pooled IOLTA account consist of banking laws, banking practices, economic realities, a lawyer's ethical obligations regarding trust accounts, state law IOLTA rules, and IOLTA account deposit contracts. Consideration of these "objective rules," "customs," and "legal traditions," mixed in with a healthy dose of economic reality, demonstrates the fallacy of claiming that the owner of monies subject to IOLTA pooling has a reasonable investment-backed expectation of receiving a pro rata share of any interest borne by the pooled account. Individuals who make nominal or short-term deposits into lawyer trust accounts have never had a reasonable

investment-backed expectation of receiving interest, in either the pre-IOLTA or post-IOLTA world.

Before certain changes in federal banking law in 1980, there was no opportunity for any client to earn interest on client funds held by his lawyer in trust, regardless of the size of the principal. Even after banking law changes permitted interest-bearing demand accounts (NOW accounts), such accounts offered no hope of earning interest for those clients whose deposits were nominal or short-term in nature. The post-IOLTA world is no friendlier to client expectations of receiving interest on lawyer trust account deposits that, on their own, are either too nominal or too temporary to generate any earnings for the client. Although IOLTA programs permit (and in some States, like Washington, require) lawyers to pool such accounts in order to create a single account with interest-bearing capacity, the terms of a lawyer's deposit contract with the bank clearly establish that whatever interest is generated will be used to fund the nonprofit IOLTA foundation. *See, e.g.*, Washington Rule of Professional Conduct 1.14(c). Thus, in regard to a client's expectations of earning interest on short-term or nominal deposits in a lawyer trust account, IOLTA programs have changed nothing. With or without IOLTA, no trust account depositor has ever possessed a reasonable investment-backed expectation of receiving interest from the types of deposits that are subject to IOLTA pooling.

Third, IOLTA programs promote the common good without imposing an economic burden on any individual or group of individuals. As the Court explained in *Penn Central*, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. IOLTA programs unquestionably promote the common good by providing millions

of dollars for legal services for the poor, thereby making a valuable contribution to the States' obligation to provide their citizens equal access to state courts. Thus, the present case again sharply contrasts with *Webb's*, where the government offered no justification to support its retention of $100,000 interest earned on interpleaded funds that were independently capable of earning that interest separate and apart from the government-administered account. *See* 449 U.S. at 163.

In rare situations, a governmental regulation works such a destructive impact on real property interests that *Penn Central*'s third factor – the character of the governmental action – becomes controlling, making it unnecessary to weigh other factors. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 432, 434-35 (1982). The Court, however, has applied this "per se taking" analysis only to governmental regulations of real property that act like a governmental exercise of eminent domain, the classic example of a traditional taking. *See id.* at 432-36; *Lucas*, 505 U.S. at 1018-19 (1992). Thus, the Court has found a per se taking in only two narrowly defined and distinctive situations: 1) when the governmental action compels the property owner to suffer a permanent physical invasion of his real property, *Loretto*, 458 U.S. at 432-36; and 2) when governmental land use regulation denies an owner "all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015-18.

Because the States' IOLTA programs do not even interfere with real property, they are hardly comparable to an exercise of eminent domain. Therefore, this is not a case where the character of the governmental action is so destructive of recognized property values that it should be regarded as a per se taking. The Court has never found a per se taking in cases involving an alleged governmental taking of money, did not do so in *Webb's* (*see* 449 U.S. at 160-65), and should not venture down that path today. Indeed, the Court has acknowledged that alleged takings

of money will rarely constitute a taking under any analysis, much less a taking per se. *See, e.g.*, *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (emphasizing that the "loss of future profits . . . provides a slender reed upon which to rest a takings claim.").

This case is ultimately about whether the Takings Clause of the Fifth Amendment can be interpreted to authorize a substantial intrusion into an area that fundamentally is a matter of state concern. There are few arenas in which the States have stronger interests than in the administration of their own judicial systems. Moreover, the States frequently have a constitutional obligation to provide equal access to the state judicial system, an obligation that the States are pursuing in part through IOLTA programs. In light of such significant state interests and obligations, the Court should require a much stronger demonstration of a "taking" of property than can be shown in this case before reading the Takings Clause to interfere with all fifty States' efforts to improve the administration of justice in their courts.

ARGUMENT

STATE IOLTA PROGRAMS DO NOT EFFECT A FIFTH AMENDMENT TAKING OF PROPERTY.

Nearly a quarter century ago, this Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-25 (1978), reviewed the factors that had shaped its Fifth Amendment Takings Clause jurisprudence. The *Penn Central* Court explained that determining whether governmental action constitutes a taking ordinarily involves an ad hoc inquiry in which the following factors enjoy particular significance: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation interferes with distinct investment-backed expectations; and 3) the character of the governmental action, including whether the challenged public program is

merely adjusting the benefits and burdens of economic life in order to promote the common good. *Id.* at 124. The *Penn Central* analysis generally continues to govern this Court's contemporary application of the Takings Clause to governmental programs that have an alleged impact on property rights. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001); *Tahoe-Sierra Preservation Counsel v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1481-84 (2002).

In only two narrowly defined situations involving governmental interference with real property, the Court has decided that a "per se taking" approach is preferable to a full *Penn Central* analysis: first, when the governmental action compels the property owner to suffer a permanent physical invasion of his real property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-36 (1982); and second, when governmental land use regulation denies an owner "all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-18 (1992). Yet, even in these rare situations, the Court has not ignored the *Penn Central* analysis, but has simply recognized that the third *Penn Central* factor – the character of the governmental action – will weigh so heavily in favor of the property owner that it necessarily will be the controlling factor in such cases. *See, e.g.*, *Loretto*, 458 U.S. at 426, 432, 434-35. In other words, in *Loretto* and *Lucas*, the character of the governmental action was so destructive of real property values that the government could not avoid the conclusion that it had "taken" the owner's property. *See Loretto*, 458 U.S. at 435 (permanent physical occupation of real property "is perhaps the most serious form of invasion of an owner's property interest"); *Lucas*, 505 U.S. at 1017 (governmental regulation that totally deprives a landowner of all productive or economically beneficial use of land is an "extraordinary circumstance"). Consequently, there was no need to consider additional factors that could

not, in any analysis, have changed the outcome. *See Loretto*, 458 U.S. at 432, 434-35; *Lucas*, 505 U.S. at 1015.[3]

In all cases not falling under *Lucas* and *Loretto*'s per se taking approach, a full consideration of all the *Penn Central* factors is warranted, including, of course, inquiry into whether a legitimate public interest is advanced in support of the governmental restraint on property. *See Penn Central*, 438 U.S. at 124-25; *Lucas*, 505 U.S. at 1015-16; *Loretto*, 458 U.S. at 434-35. In the typical case, the Court's "usual assumption" is that the state program at issue is simply "adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124; *Lucas*, 505 U.S. at 1017. The Court's deference to governmental programs that affect property – deference accorded in all but the "relatively rare situations" involved in *Lucas* and *Loretto* – is founded on this Court's assertion 80 years ago in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), that "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *See Lucas*, 505 U.S. at 1018.

[3] Thus, because *Loretto* and *Lucas* – and similar cases – would arrive at the same result even upon a painstaking application of the traditional ad hoc methodology, the per se taking approach employed in *Loretto* and *Lucas* is hardly a rejection of the *Penn Central* analysis, but rather a *confirmation* of it. Petitioners themselves acknowledge, at pages 16-17 of their brief: "[T]he *per se* test truncates the fuller *Penn Central* analysis of all surrounding factors only where those factors cannot possibly alter the conclusion that a taking has occurred[.]" Petitioners' attempt to downplay this reality in an effort to avoid a *Penn Central* analysis is undermined not only by *Penn Central*'s description of the ad hoc analysis as the general approach to Takings Clause cases, but also by *Loretto* and *Lucas* themselves, which 1) *are* an application – though a short-circuited application – of *Penn Central*; and 2) inevitably would have come to the same conclusion pursuant to a full ad hoc application of the *Penn Central* analysis, thereby rendering such a methodology unnecessary.

Because IOLTA programs promote the common good without burdening any individual, they are deserving of this Court's usual Takings Clause deference.

A straightforward application of the *Penn Central* analysis to this case demonstrates that the States' IOLTA programs work no taking that would require compensation to the individuals whose use of the legal system occasions making the type of lawyer trust account deposit subject to IOLTA pooling.[4] Each of the three *Penn Central* factors weighs heavily in favor of upholding the State of Washington's IOLTA program. Moreover, this is not one of those "relatively rare situations" where the character of the governmental action so conclusively demonstrates a per se taking that consideration of other relevant factors becomes unnecessary.

A. Application Of The *Penn Central* Factors Demonstrates That IOLTA Programs Do Not Constitute A Taking.

1. IOLTA Programs Impose No Economic Burden On Those Individuals Whose Lawyer Trust Account Deposits Are Subject to IOLTA Pooling.

IOLTA programs prohibit the use of IOLTA accounts to pool client monies that are independently capable of producing interest for the client. *See, e.g.*, Washington Rule of Professional Conduct 1.14(c). The only trust account deposits that are eligible for pooling in an IOLTA account are those which are either too nominal or too

[4] The arguments that weigh heavily in support of a holding that IOLTA works no taking also support an argument that, even if there somehow is a taking, just compensation in these unique circumstances would be nil, as respondents demonstrate.

temporary to earn net interest for the client. *Id.* In other words, the only interest generated by IOLTA's pooled accounts is interest that the individual owners of the pooled monies could not, and would not, generate on their own. Unless the Court accepts petitioners' strained view of IOLTA, whereby an individual can see the interest generated in part by his deposit in the pooled account, while remaining blind to the fact that it was IOLTA pooling that enabled his deposit to enjoy interest-bearing potential in the first place, the net economic impact of IOLTA must be regarded as zero.

The absence of economic impact in the present case stands in sharp contrast to *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). In that case, Eckerd's Pharmacies agreed to purchase Webb's Fabulous Pharmacies for $1.8 million but, at closing, Webb's debts appeared to be greater than the purchase price. *Id.* at 156. In order to protect itself, Eckerd's filed a complaint of interpleader and tendered the purchase price to the court. *Id.* at 156-57. Almost a year later, the court appointed a receiver for Webb's and a dispute arose when the clerk refused to turn over the interest that was earned on the interpleader fund while it was held by the court, interest which eventually amounted to over $100,000. *Id.* at 157-58. This Court held that the county's refusal to turn over the interest on the interpleader fund was an unconstitutional taking without just compensation. *Id.* at 164-65.

The primary distinction between *Webb's* and the present case is that, unlike the deposits subject to IOLTA pooling, the year-long $1.8 million deposit in *Webb's* was independently capable of generating interest for the benefit of the principal's owner. The *Webb's* deposit was neither nominal nor short-term. Additionally, because the clerk in *Webb's* had already deducted an administrative fee, it was apparent that the year-long $1.8 million deposit was independently capable of earning interest in excess of administrative costs. 449 U.S. at 162. Therefore, unlike

IOLTA interest, which cannot be realized in the absence of the pooled IOLTA account, the interest in *Webb's* could have been earned separate and apart from the interpleader fund. Consequently, also unlike the present case, there was no possible way that the clerk in *Webb's* could take credit for creating the deposit's interest-bearing potential. In short, the governmental action in *Webb's* caused an obvious – and severe – economic injury to the owner of the interpleader fund's principal, with no governmental justification whatsoever. *Id.* at 163. The Court in *Webb's* emphasized that the Takings Clause stands as a shield against just such arbitrary uses of governmental power. *Id.* at 164. In contrast, the States' IOLTA programs place no economic burden on trust account depositors, and the legal services afforded by IOLTA programs to those who could not otherwise afford them undercuts any charge of governmental arbitrariness.

A second fundamental distinction between *Webb's* and the present case is that the interpleader fund in *Webb's* was not designed to benefit the county, but rather was maintained specifically for the ultimate benefit of Webb's creditors. *Id.* at 161. Indeed, that was the very point of Eckerd's decision to file the interpleader action and deposit the purchase price for Webb's assets into the fund. *Id.* at 156-57. But the States' purpose in requiring that nominal or short-term deposits be placed into IOLTA accounts is to generate funding for the States' IOLTA foundations and their public interest programs. IOLTA pooling is not done in order to achieve the impossible – *i.e.*, to produce interest for the various owners of the nominal or short-term deposits, interest that inevitably would be swallowed up by the banking and accounting costs of attempting to subdivide it among all the depositors.

It follows from the preceding distinction of *Webb's* that *Penn Central's* economic impact analysis should focus on the economic burden imposed by the IOLTA program taken as a whole. Petitioners ignore this reality and

attempt to demonstrate an adverse economic impact by divorcing IOLTA's productive pooling mechanism from IOLTA's very purpose. Although petitioners argue that economic impact should be assessed in light of "the world as it is," in "the real world where IOLTA exists," *see* Pet. Br. 32-33, it is evident that what petitioners really want is only part of the "real world" of IOLTA – the pooling part that bestows interest-bearing potential on petitioners' otherwise unproductive monies. What petitioners do not want is the part that allegedly "burdens" them – the part that provides the incentive for the pooling, the part that assigns the interest to the IOLTA foundation. It is hardly a "real world" form of accounting that records debits but not credits; but it is only by taking IOLTA pooling for granted that petitioners can pretend to have suffered a burdensome economic impact from a program that bestows interest-bearing potential on their otherwise unproductive monies. The Court's Takings Clause jurisprudence has never ignored economic reality; and economic reality in the present case requires an assessment of economic burden in light of the IOLTA program viewed in its entirety.[5] Petitioners, therefore, cannot establish economic impact by artificially dissecting IOLTA in an attempt to isolate and attack those parts of IOLTA that they do not like, while simultaneously claiming the benefits of those parts that they do.

[5] Viewing IOLTA in its entirety also requires consideration of other parts of the program that petitioners have not challenged, and that work to the benefit of trust account depositors generally, including the IOLTA program's requirement that all deposits independently capable of earning interest – because they are sufficiently large or long-term – be placed in an interest-bearing account with the interest paid to the depositor. *See* Washington Rule of Professional Conduct 1.14(c). This requirement did not exist prior to IOLTA.

Petitioners additionally argue that they have suffered economic harm as a result of various banks' decisions to terminate "earnings credit" programs. *See* Pet. Br. 6. But petitioners never explain how a governmental program can be held constitutionally accountable for the financial fallout caused by *private* institutions' voluntary responses to that program. This line of causation is so tenuous – IOLTA caused private banks to reduce their "earnings credit" programs, which caused private escrow and title companies to lose some of their "perks" for doing business with those banks, which caused those private companies to pass along to their customers (*e.g.*, petitioners) some of the cost of those lost perks – that whatever "earnings credit losses" have been sustained are not even fairly attributable to state *action* much less to a state *taking*. In other constitutional contexts, this Court has been careful to hold governmental entities responsible only when there is a far more direct line of causation between governmental action and individual harm than that demonstrated by petitioners' "earnings credit" argument. *See, e.g.*, *Bryan County v. Brown*, 520 U.S. 397, 412-15 (1997).

Finally, petitioners argue that they have been "singled out" and therefore uniquely suffer IOLTA's economic impact. *See* Pet. Br. 22-31. Even assuming arguendo that IOLTA programs somehow cause a harmful economic impact, petitioners' claim that they have been singled out does not withstand scrutiny. Given that IOLTA programs produce millions of dollars annually by pooling nominal or short-term deposits incapable of generating interest on their own, and given the common use of lawyer trust accounts and escrow, whatever "burden" is imposed by IOLTA, if any, is easily being spread across hundreds of thousands, if not millions, of citizens. Petitioners certainly have produced no evidence to the contrary – *i.e.*, that just a few individuals have been singled out. Moreover, even assuming that relatively few users of the justice system have been subjected to this utterly nonexistent "burden,"

the States have a legitimate reason for so "singling them out." The monies of individuals like petitioners are singled out for IOLTA pooling precisely because of the *absence* of economic impact on those whose trust account deposits are too nominal or too short-term to generate income on their own. Collecting a fee from all users of the justice system, or all users of lawyer trust accounts, might also be a constitutional means of funding legal services for the poor; but, unlike IOLTA programs, such alternatives *would* impose an economic impact on users of the justice system. In sum, IOLTA "singles out" only those who will suffer no economic disadvantage as a consequence of IOLTA. It is difficult to think of a governmental program that is either more well-aimed or less economically burdensome.

2. Individuals Whose Trust Account Deposits Are Eligible for Pooling in an IOLTA Account Have No Reasonable Investment-Backed Expectations of Enjoying the Interest Produced by the Pooled Account.

No client has ever possessed a reasonable investment-backed expectation of receiving interest from the types of trust account deposits that are subject to IOLTA pooling. To be worthy of constitutional protection, an individual's expectations must be "based on objective rules and customs that can be understood as reasonable by all parties involved." *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). Moreover, "reasonable expectations must be understood in light of the whole of our legal tradition," and "courts must consider all reasonable expectations whatever their source." *Id.* In the present case, the sources of a client's reasonable investment-backed expectations regarding monies deposited into a pooled IOLTA account consist of banking laws, banking practices, economic realities, a lawyer's ethical obligations regarding trust accounts, state

law IOLTA rules, and IOLTA account deposit contracts. Consideration of these "objective rules," "customs," and "legal traditions," mixed in with a healthy dose of economic reality, demonstrates the fallacy of claiming that the owner of monies subject to IOLTA pooling has a reasonable investment-backed expectation of receiving a pro rata share of the interest borne by the pooled account.

Individuals, like petitioners, who make nominal or short-term deposits into lawyer trust accounts, have never had a reasonable investment-backed expectation of receiving interest in either the pre-IOLTA or post-IOLTA world. Before certain changes in federal banking law in 1980, there was no opportunity for the client to earn interest on client funds held by the lawyer in trust, regardless of the size of the principal.[6] Even after banking law changes permitted interest-bearing demand accounts (NOW accounts), such accounts offered no hope of earning interest for those clients, like petitioners, whose deposits were nominal or short-term in nature.[7]

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[6] Ethical rules have always required that lawyer trust account monies be available on a client's demand. Before 1980, banking laws did not permit interest-bearing demand accounts. Therefore, prior to 1980, the only banking option available to attorneys for holding a client's funds in trust was a non-interest-bearing demand deposit account.

[7] The bank's service charges would exceed the interest earned by a separate account composed only of one depositor's nominal or short-term funds. Even when lawyers, prior to IOLTA, chose to pool the nominal or short-term trust account deposits of multiple clients, only the banks enjoyed the interest. Ethical rules prohibited (and still do) lawyers from profiting off of their clients' trust funds; and banking fees and administrative expenses would have exceeded the interest earned from such pooled accounts if banks had been asked to divvy up the interest among all the depositors. That lawyers have no economic advantages over banks may explain why petitioners have produced no evidence of any law firm practices, prior to (or after) the advent of IOLTA programs, whereby law firms donated trust account management and subaccounting services to their clients in order to generate

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The post-IOLTA world is no friendlier to client expectations of receiving interest on lawyer trust account deposits that, on their own, are either too nominal or too temporary to generate any earnings for the client. Although IOLTA programs permit (and in some States, like Washington, require) lawyers to pool such accounts in order to create a single account with interest-bearing capability, the terms of a lawyer's deposit contract with the bank clearly establish that whatever interest is generated will be used to fund the nonprofit IOLTA foundation. *See, e.g.*, Washington Rule of Professional Conduct 1.14(c). Thus, in regard to a client's expectations of earning interest on short-term or nominal deposits in a lawyer trust account, IOLTA programs have changed nothing. Clients had no expectation of enjoying interest before IOLTA and have no expectation after.

Holding that an individual has no reasonable investment-backed expectation of receiving any portion of the interest generated by a pooled IOLTA account is perfectly consistent with the purpose of the Takings Clause, which "protects private expectations to ensure private investments." *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). Attempting to divide the IOLTA interest among the owners of the pooled deposits not only would be economically futile, but also would make no meaningful contribution to "ensuring private investment." Because the private incentive in making a deposit into a lawyer trust account (or into escrow) is *not* to earn interest, but rather to ensure

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insignificant amounts of interest for those clients with nominal or short-term trust account deposits. Consequently, there is nothing that would support a reasonable investment-backed expectation, pre-IOLTA or post-IOLTA, that lawyers will provide free of charge whatever services are necessary to generate interest for the client. Indeed, the efforts needed to manage such accounts would likely defeat the convenience of having lawyer trust accounts in the first place.

the timely receipt of legal services, or to facilitate a legal transaction (such as a real estate transaction), the States' retention of IOLTA interest can hardly be expected to chill private "investment" in legal or real estate services. Even assuming that an owner of nominal or short-term deposits subject to IOLTA pooling subjectively expects to earn interest, that is not a reasonable investment-backed expectation. Indeed, in light of banking laws, banking practices, economic realities, a lawyer's ethical obligations, state law IOLTA rules, and IOLTA account deposit contracts – which surely qualify as those "objective rules and customs" that define reasonable investment-backed expectations – it is untenable to claim that the nominal or short-term deposits subject to IOLTA pooling are "investments" motivated by growth potential. (One might as well "invest" by putting money in a shoe box under the bed.)

Petitioners point to nothing that would support an individual's expectation of earning interest on the nominal or short-term deposits subject to IOLTA's pooling requirement; and positive law (in the form of the IOLTA program) affirmatively precludes such an expectation. This Court has consistently recognized that such pre-existing laws generally should be taken into account in weighing the property owner's reasonable investment-backed expectations. Although the Court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-30 (2001), rejected the proposition that laws already in effect at the time the property owner acquires title *always* foreclose expectations that are inconsistent with those laws, the Court's opinion in *Palazzolo* in no way denies that such pre-existing laws are a common and important source of reasonable expectations. *See id.* at 626, 629-30; *see also id.* at 632-36 (O'Connor, J., concurring) (emphasizing that acquiring title to property after the challenged regulation has gone into effect is a factor that normally militates against a finding that the state program has worked a "taking"; it is just not a conclusive factor.)

Indeed, positive state law plays an even stronger role here than in cases, like *Lucas* and *Palazzolo*, that involve real property.[8] It is true that members of this Court have expressed varying views regarding the interaction between reasonable expectations and positive law when real property is at stake. *See, e.g., Palazzolo*, 533 U.S. at 635-636 (O'Connor, J., concurring) ("Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred."); *id.* at 637 (Scalia, J., concurring) ("In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the 'background principles of the State's law of property and nuisance') should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.") (internal citations omitted); *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring) ("In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source."). But the Court has recognized that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless." *Lucas*, 505 U.S. at 1027-28.

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[8] The concern underlying the Court's holding in *Palazzolo* dealt uniquely with land use regulation. *See id.* at 627-28. Because it often

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That the IOLTA rules themselves can legitimately define the reasonable expectations of property owners is especially true in a case like this, where the State's IOLTA rules were in force long before the client's "investment" of nominal or short-term monetary deposits into a lawyer trust account. Individuals simply do not invest with the reasonable expectation that years of litigation might be able to overturn plainly applicable rules. Thus, with respect to the present case, it is entirely appropriate for the State to defend its IOLTA program against a Takings Clause attack by arguing that IOLTA rules, as well as the IOLTA deposit contracts, expressly foreclose any client expectations of receiving interest on the nominal or short-term deposits subject to IOLTA pooling.

Petitioners do not deny that the IOLTA rules may legitimately influence an IOLTA depositor's expectations regarding IOLTA-generated interest. But, once again, petitioners carefully pick and choose which parts of the IOLTA program they deem relevant to reasonable investment-backed expectations. This leads to the odd argument that, on the one hand, IOLTA's pooling mechanism supports petitioners' expectations of earning interest, but, on the other hand, IOLTA's clear assignment of the interest to the nonprofit IOLTA foundation should not be considered to undermine those expectations. Petitioners' "half-a-loaf" expectations are so inherently

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takes years for a land owner's regulatory takings claim to ripen, the *Palazzolo* Court found that it would give the government too much power to reduce the amount of private property rights remaining to citizens if courts automatically refused to permit Takings Clause challenges to be brought by land owners who acquired title after the governmental regulation at issue went into effect. *Id.* The decision in *Lucas* likewise concerned state laws that deprive a landowner of all productive or economically beneficial use of *land*. 505 U.S. at 1027-29. Such land-based concerns have nothing to do with the present case.

unrealistic – expecting to receive the benefits of a program whose very purposes they are attempting to thwart – that those expectations can hardly "be understood as reasonable by all parties involved." *See Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). In any event, it seems disingenuous for the petitioners to argue that the reasonableness of their expectations is supported by the very program that is the target of their Takings Clause attack.

3. The Character of IOLTA is That of a Public Program That Promotes the Common Good Without Burdening Any Individual.

The third *Penn Central* factor concerns the character of the governmental action alleged to constitute a taking. 438 U.S. at 124. The *Penn Central* Court explained that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* The Court acknowledged in *Lucas* that it ordinarily indulges an assumption that the latter is true. 505 U.S. at 1017-18. The present case involves a Takings Clause challenge to a state program, operated in similar respects by all fifty States, that seeks only to apply an unused economic resource toward the State's obligation under the federal constitution to afford its citizens equal justice under the law. By enacting IOLTA programs with the goal of facilitating equal justice under the law, the fifty States are promoting the common good. Not only is there substantial public good produced by the States' IOLTA contributions to equal justice, but also, as demonstrated earlier, the attendant economic burden on those whose deposits are subject to IOLTA pooling is zero.

The "common good" done by IOLTA programs goes to the heart of the role played by the justice system in American society. At bottom, the justice system is designed to be a peaceful dispute resolution mechanism. Societal peace and stability are fostered when citizens take their disputes to court rather than settling them in the street. For the justice system to achieve these broad social goals effectively, it must operate in a way that inspires public confidence. When access to the courts is financially beyond the reach of large numbers of citizens, public confidence in society's primary dispute resolution mechanism is undermined, which can quickly lead to a breakdown of peace, order, and stability. Given these self-evident fundamentals, IOLTA programs serve not just the poor, and the typical causes of the poor, but provide benefits to everyone. Thus, as in *Penn Central*, 438 U.S. at 134-35, where "the preservation of landmarks benefit[ted] all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole," so too does IOLTA benefit society as a whole by improving the quality of justice and therefore the quality of life.

The present case therefore is readily distinguishable from *Webb's*, where the government offered no justification whatsoever – no police power justification, no government service, no program, nothing – in support of its retention of $100,000 interest earned on interpleaded funds that were independently capable of earning that interest separate and apart from the government-administered account. 449 U.S. at 163. It was the sheer arbitrariness of the governmental action in *Webb's* that was fatal to the government's case. *Id.* at 163-64. Similarly, petitioners' hypotheticals involving blatant governmental arbitrariness – *e.g.*, confiscating an individual's bank account or car utterly without reason (*see* Pet. Br. 27) – are plainly inapposite. Such illustrations are more analogous to the arbitrary and unjustifiable governmental action in *Webb's* than they are to public programs, such as IOLTA, that

promote the common good without depriving any individual of economically realistic investment-backed expectations.

B. IOLTA Programs Are Wholly Unlike Those Governmental Regulations That This Court Has Found So Inherently Destructive Of Real Property Values As To Constitute Takings Per Se.

The Court has applied a categorical "per se taking" approach only in those rare circumstances where the character of the governmental action is so dramatically destructive of recognized property values that consideration of the government's justification (as well as other *Penn Central* factors) could not possibly permit the government to avoid the conclusion that it has taken property. *See Lucas*, 505 U.S. at 1015. As noted above (*see* pages 7-8), the Court has recognized only "two discrete categories of regulatory action" as constituting takings per se. *Id.* First, governmental regulations necessarily constitute a taking if they compel the property owner to suffer a physical invasion of real property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Second, a per se taking occurs "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. Washington State's IOLTA program plainly does not fit this Court's description of either type of per se taking. Indeed, the state regulation in the instant case is entirely unlike those considered in *Loretto* and *Lucas*.

In *Loretto*, a New York statute required landlords to permit a cable television company to install its facilities on the landlord's property. 458 U.S. at 423-24. The Court held that a taking necessarily occurs when the government compels a property owner to suffer a physical intrusion that "reaches the extreme form of a permanent physical occupation." *Id.* at 426. The *Loretto* Court explained that it

has invariably found a taking when faced with "a constitutional challenge to a permanent physical occupation of real property." *Id.* at 427. The *Loretto* Court's reference to invasions of "real property" is not an accident. Each of the precedents that the *Loretto* Court cited in support of its per se taking conclusion, dating back to 1872, involved permanent physical occupation of real property. *See, e.g., Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872) (dam that permanently flooded plaintiff's land); *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893) (permanent placement of telegraph poles on plaintiff's land); *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540 (1940) (permanent placement of telegraph lines over plaintiff's right of way); *United States v. Causby*, 328 U.S. 256 (1946) (frequent flights immediately above plaintiff's land); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (take-over of plaintiff's coal mine); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (deprivation of plaintiff's right to exclude others from his private marina). Throughout the *Loretto* opinion, the Court repeatedly describes its precedent as recognizing a per se taking in the event of a permanent physical invasion of real property. *See, e.g.*, 458 U.S. at 427 ("permanent physical occupation of real property"), 427 n.5 ("physical [trespassory] takeover"), 428 ("physical invasion of the real estate of the private owner"), 430 ("permanent occupations of land"), 430 n.7 ("physical occupation of real property"), and 435 (permanent occupation of "physical property").

Similarly, the Court in *Lucas* was every bit as emphatic in limiting its per se taking approach to certain types of governmental interference with real property. *Lucas* involved state land use regulations that barred the landowner from erecting any permanent habitable structures on his beachfront property, thereby rendering his parcels valueless. 505 U.S. at 1006-07. After acknowledging its categorical treatment of *Loretto*-like cases, the *Lucas* Court explained that "[t]he second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or

productive use of land." 505 U.S. at 1015. The Court repeatedly referred to the use of "land" and "real property" throughout the opinion. *See, e.g., id.* at 1016, 1017, 1018, 1019. The *Lucas* Court suggested that governmental deprivation of all beneficial uses of a property owner's land is akin to the physical appropriation of real property identified as a per se taking in *Loretto*. 505 U.S. at 1017.

This Court's application of the per se approach to certain types of governmental interference with real property helps to harmonize the Court's traditional view of takings with the relatively more recent "regulatory takings" cases. The classic illustration of a traditional taking is the government's exercise of its eminent domain power – literally "taking" land to build a road, a dam, etc. Although the typical regulatory taking case involves governmental interference of a different character, there are some alleged regulatory takings that are highly analagous to an exercise of eminent domain. *See Lucas*, 505 U.S. at 1018-19. The per se takings cases do no more than announce that if the governmental regulation acts like a traditional eminent domain taking, the Court will find that a taking occurred. For example, *Lucas* involved a coastal landowner's allegation of a regulatory taking but, because the State's land use regulation deprived the property owner of all economically beneficial or productive use of his land, the regulation acted like an exercise of eminent domain. *See id.* That explains the significant legal distinction between governmental regulation that deprives the landowner of 100% of the land's value (which is subject to a per se analysis) and regulation that deprives the owner of 95% of the land's value (which is subject to *Penn Central*'s ad hoc inquiry). *See id.* at 1019-20 n.8. Only the former triggers a per se analysis because only the former acts like an exercise of eminent domain.

Loretto is also instructive because it provides several examples of governmental interference with property that do *not* constitute takings under any analysis, whether ad

hoc or per se. Temporary flooding of land, even though it may cause the permanent loss of sums of money (either in the form of lost profits or the cost of repairs), is not a taking. 458 U.S. at 428 (citing several cases). Ordering certain gold mines to cease operations during war time in order to conserve manpower and equipment for use in other mines that are more essential to the war effort, despite causing the permanent loss of those profits that otherwise could have been earned during the time operations were prohibited, is not a taking. 458 U.S. at 431 (*citing United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958)). Prohibiting the sale of eagle feathers, although it causes traders of bird artifacts to suffer a permanent loss of those future profits that would otherwise have been earned, is not a taking. 458 U.S. at 433-34 n.10 (*citing Andrus v. Allard*, 444 U.S. 51 (1979)). Indeed, in *Andrus*, the Court emphasized that the "loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim." 444 U.S. at 65-66.

The Court's discussion of Takings Clause precedent in *Loretto* reveals a clear distinction between the permanent physical occupation of real property, which constitutes a per se taking, and the permanent loss of certain amounts of money – whether in the form of lost future profits, or losses due to the cost of repairs – which normally do not constitute takings, much less takings per se. The alleged lost interest income in this case should be treated no differently. Even the New York landmark preservation law at issue in *Penn Central*, which caused the owners of Grand Central Terminal to suffer substantial losses of monetary value, was ruled not to effect a taking. 438 U.S. at 138. Therefore, even if it is possible to view IOLTA as somehow causing petitioners to suffer a "loss" of interest that could not have been earned outside of an IOLTA account, there is no case in all of the Court's Takings

Clause jurisprudence that treats governmental interference with money as a per se taking.

Webb's is the only case cited by petitioners where the Court found that governmental interference with money constituted a taking. Yet, even despite the relatively obvious taking in that case, the Court did not employ the per se approach. *See* 449 U.S. at 161-64. Rather, the Court in *Webb's* considered the purpose of the governmental action (there was no apparent program; the government's action looked totally arbitrary), the economic burden on the claimant ($100,000 of interest that could have been earned separate and apart from the interpleader account), and the property owner's expectations (the interpleader fund was specifically held for the ultimate benefit of Webb's creditors, not for the government). *See id.* Thus, even though *Webb's* presented a relatively easy takings issue, and even though the governmental action readily appeared to constitute a taking, the Court plainly did not apply a per se taking approach. Moreover, when the Court decided *Loretto* just two years later, and methodically marshaled precedent in support of its categorical treatment of "physical invasions," there was not even a mention of *Webb's*. *See Loretto*, 458 U.S. at 426-35. Later, in *Lucas*, the Court expressly drew a distinction between those types of governmental interference with land that constitute per se takings, and governmental interference with personal property, which normally does not constitute a taking under any analysis. 505 U.S. at 1027-28.

Extending the per se analysis to cases involving an alleged taking of money would prove unworkable. Even in the case of land, this Court has noted the difficulty of identifying the "denominator" – *e.g.*, whether a deprivation of all beneficial uses of two acres of a landowner's ten acres of land holdings is a 100% loss of value of two acres or merely a partial loss of value of ten acres. *See Lucas*, 505 at 1016-17 n.7. Extending the per se taking approach

to cases involving an alleged taking of money would pose an even more intractable "denominator" problem. Unless individuals are permitted to argue that the challenged regulation caused them to lose 100% of the value of the monetary amount that was allegedly lost (which would make *every* deprivation of money a per se taking), *Penn Central*'s warning about artificial segmentation of property (until the point of total destruction of some portion is reached) must be heeded. *See* 438 U.S. at 130 (" 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.").[9]

Moreover, an extension of the per se analysis to cases involving the alleged taking of money, without careful identification of the correct denominator, could have far-reaching detrimental consequences for the States' ability to fund state governmental programs, and would likely invite Takings Clause attacks on state income taxes, property taxes, and sales taxes. Petitioners acknowledge

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[9] Although the discussion in *Penn Central* is limited to real property, it is petitioners who are asking the Court to extend to alleged monetary losses the per se approach heretofore limited to certain regulations of real property. But petitioners cannot have it both ways. Consistent with their logic, all of the rules governing per se takings of real property should apply to this case, including *Penn Central*'s rule foreclosing the use of an artificial denominator. Thus, unless petitioners can argue "interest follows principal" in order to establish a property right in the interest, *see Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), but then argue that the interest should be considered separate and apart from the principal when attempting to establish a per se taking of 100% of their interest, the deposited principal amounts must be considered part of the "denominator" when assessing the nature of IOLTA's impact on petitioners. And the petitioners were in no way completely deprived of the economically viable use of their principal; quite to the contrary, the principal deposit was working for them, whether facilitating the timely delivery of legal services, or the successful completion of a real estate transaction.

that taxes and user fees are not takings (Pet. Br. 27-28), but fail to explain how their proposed per se rule would permit States to continue using such revenue-gathering strategies without having to defend numerous lawsuits. Per se is per se. Presumably the States would have to justify these programs by showing that any particular plaintiff is receiving just compensation, even though many of the benefits of state governmental programs are enjoyed only by others, or by groups to which the plaintiff does not belong.

Finally, extending the per se analysis to cases involving an alleged taking of money would carry an increased potential – as indicated by the current case – of identifying as a per se taking that which a full *Penn Central* analysis would reveal to be a non-taking. Such an overuse of the categorical approach would inject an unnecessary element of arbitrariness into this Court's Takings Clause jurisprudence. Therefore, the earlier demonstration that a full *Penn Central* analysis indicates that IOLTA does not work a taking also shows the impropriety of extending the per se takings approach to the present case.

C. Petitioners' Expansive View Of The Takings Clause Substantially Intrudes On The States' Ability To Pursue Efficient Strategies For Funding State Programs.

A decision that IOLTA programs constitute an unconstitutional taking will have widespread negative implications for States' efforts to efficiently fund an essential state initiative – ensuring the equality of justice in state courts. This Court has often recognized the magnitude of a State's interest in the administration of its own justice system. *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991). Indeed, this Court has determined that the Constitution itself requires the States to ensure equal justice for the

poor by providing counsel and other litigation services to the indigent. *M.L.B. v. S.L.J.*, 519 U.S. 102, 110-16, 119-24 (1996) (collecting and reaffirming cases). In light of such significant state interests and obligations, the Court should require a much stronger showing of a taking than exists in the present case before reading the Constitution to interfere with all fifty States' efforts to improve the administration of justice in their courts.

This Court has been especially sensitive to state interests in its Takings Clause jurisprudence. *See, e.g., Lucas*, 505 U.S. at 1017-18 ("our usual assumption [is] that the [State] is simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to everyone concerned.") (citations omitted), 1027 ("the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police power."), and 1027-28 ("And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might render his property economically useless.").

At a time when governmental institutions across the land – both state and federal – are routinely criticized for economic waste and bureaucratic inefficiency, it is ironic that the States would be attacked for devising an efficient approach to reducing the wasteful costs and fees associated with the maintenance of lawyer trust accounts, a cost savings that is directed toward improving the quality of justice available to state citizens in state courts. Indeed, the posture of this case indicates that petitioners may be motivated more by the desire to undo IOLTA programs nationwide than by the desire to recover the "few dollars and some-odd cents" of interest attributable to their portion of the pooled account, interest that inevitably

would be exceeded by the accounting costs of attempting to divide it among all the nominal or short-term depositors. Of course, if petitioners prevail, those clients whose deposits currently are placed in IOLTA accounts will still earn zero on their "investment."

At bottom, this lawsuit is less about whether individuals are losing small amounts of interest than how that interest is collectively spent. And fundamental principles of federalism counsel against using the Constitution to thwart how a State chooses to spend money that it has generated through its own regulation of lawyer trust accounts. Whether IOLTA interest is spent to provide equal access to the courts for the poor, or used to help state governmental entities defend suits sounding in constitutional tort, should not matter. And, under the Constitution, it does not matter. The Court, therefore, should deny petitioners' attempt – and deter future litigants' attempts – to distort the Takings Clause in a way that facilitates substantial intrusions into legitimate state efforts to administer and fund essential state programs.

CONCLUSION

For the reasons set forth above and in respondents' briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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OCTOBER 2002

No. 01-1325

Supreme Court U.S.
FILED
OCT 18 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, *et al.*,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, MASSACHUSETTS, ARIZONA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA AND COMMONWEALTH OF PUERTO RICO, AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Washington's Interest on Lawyers Trust Accounts (IOLTA) rule effects a taking under the Fifth Amendment's Takings Clause even though it has no economic impact on the property owner?

2. Whether injunctive relief is available under the Fifth Amendment's Takings Clause where there is no economic loss to the property owner?

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INTEREST OF THE AMICI STATES

Petitioners seek an expansion of the Takings Clause that would have serious, far-reaching consequences for the amici States. First, although petitioners have suffered no economic loss under the Washington IOLTA rule, nor forfeited any pre-existing right to control nominal amounts of interest earned on their funds, they ask the Court to adopt a new *per se* test under which the IOLTA rule is adjudged a taking based purely on judicial assessment of its "character." Second, although the sole province of the Takings Clause is to provide just compensation, petitioners – who suffered no loss – seek federal injunctive relief against the operation of the state IOLTA program, offending both the textual limits of the Clause and core principles of federalism.

Such a dramatic expansion of the Takings Clause would seriously disrupt the States' ability to regulate the practice of law and, more broadly, could undermine well-settled exercises of the police power affecting the use or disposition of personal property. Petitioners' proposed *per se* rule, divorced as it is from an assessment of economic impact and a property owner's reasonable expectations, is a broad invitation to judicial second-guessing of the reasonable choices made by the States in adopting IOLTA programs. The amici States urge the Court to reject petitioners' effort to reshape so fundamentally the Takings Clause.

A. The States' Substantial Interest in Regulating the Practice of Law Would Be Severely Undermined by the Extension of *Per Se* Takings Rules to the Regulation of Client Trust Accounts.

Interest on Lawyers Trust Accounts (IOLTA) rules have been established in each State as a function of the States' traditional role in regulating the legal profession.[1] State codes governing lawyers' professional conduct have long required that lawyers place clients' funds in bank accounts separate from the lawyers' funds, primarily to safeguard client property and to avoid commingling. *See* ABA Model Code of Professional Responsibility, DR 9-102(A) (1970). By their terms, the States' IOLTA rules apply *only* to client funds that are so small in amount or held so briefly that they cannot produce net interest for an individual client, after consideration of the various costs related to establishing and maintaining the account. *See, e.g.*, Fla. Bar Rule 5-1.1(g) (2002). Historically, lawyers held these same nominal or short-term client funds in a pooled, non-interest bearing checking account such that "the depository institutions have had the use of the funds without payment of any interest." ABA Comm. on Ethics

[1] Florida established the first IOLTA program in 1981. At the time of this Court's decision in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), forty-nine of the States had adopted IOLTA programs. *Id.* at 159-161 and n.1. Indiana, the last State to do so, adopted an IOLTA program in 2000. Ind. Prof. Conduct R. 1.15(d) (2000). IOLTA programs also exist in the District of Columbia and the United States Virgin Islands. American Bar Association Commission on Interest on Lawyers' Trust Accounts, IOLTA Handbook (2001) ("IOLTA Handbook") at 1.

and Prof. Resp., Formal Op. 348 (1982).[2] Under IOLTA rules, lawyers are required or permitted to place such funds in a pooled, interest-bearing account, with the aggregate net interest paid to bar foundations or similar entities for distribution to programs that support the administration of justice.

State courts adopting IOLTA rules have invariably determined that they cause no economic harm to clients and contravene no ethical or fiduciary obligation of attorney to client. *See, e.g., Matter of Interest on Trust Accounts*, 538 So.2d 448, 452-53 (Fla. 1989); *Petition by Massachusetts Bar Ass'n*, 478 N.E.2d 715, 718-19 (Mass. 1985); *Matter of Interest on Lawyers' Trust Acc.*, 672 P.2d 406, 407 (Utah 1983); *In re Petition of Minn. State Bar Ass'n*, 332 N.W.2d 151, 157-58 (Minn. 1982); *Petition of New Hampshire Bar Ass'n*, 453 A.2d 1258, 1260 (N.H. 1982). Thus, petitioners' proposed *per se* rule would seriously undermine the States' sovereign interests in an area particularly reserved for their control – the practice of law. "Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions." *Leis v. Flynt*, 439 U.S. 438, 442 (1979). *See also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("[A]s part of their power to protect the public health, safety, and other valid interests [the States] have broad power to establish standards for . . . regulating the practice of professions.").

[2] Ethical considerations prohibit lawyers from keeping for themselves interest earned on any client funds. ABA Formal Op. 348.

Moreover, by placing nominal and short-term client funds in interest-bearing accounts, IOLTA rules benefit clients by decreasing the possibility that attorneys would keep potentially productive client funds in a non-interest bearing account to gain favorable treatment from the bank for the attorney or firm. According to petitioners, that incentive to act in conflict with a client existed in the instant case, until it was diminished by the extension of the Washington IOLTA rule to Limited Practice Officers (LPOs) at escrow companies.

B. IOLTA Programs Serve the States' Vital Interests in Providing Equal Access to the Courts and in Improving the Administration of Justice.

By providing for interest on pooled accounts containing nominal and short-term funds – funds that historically earned no interest – IOLTA programs further the States' vital interest in improving the quality and availability of legal services to the public. *See Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality) ("improving the quality of legal service available to the people of the State . . . is a legitimate end of state policy"). *See also Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990).

The ends served by IOLTA rules – providing equal access to the courts and improving the administration of justice – are so universally embraced that each of the fifty States has implemented the program in some fashion. *See supra* n.1. Through IOLTA programs, the States advance their substantial interest in the provision of legal services

to persons who cannot afford to hire a lawyer, thereby giving tangible meaning to the principle of equal justice under law.[3] In addition to funding legal services programs, IOLTA funds support other programs aimed at improving the administration of justice, including alternative dispute resolution programs, victim services programs, and legal education programs. IOLTA Handbook at 1-2.

The Court has emphasized the importance of providing legal representation to the poor. *See Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.") quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). The States have important interests in ensuring representation for the poor even in circumstances in which it is not constitutionally required. *See Lassiter v. Dept. of Social Services*, 452 U.S. 18, 33 (1980) (appointment of counsel for indigent parents is not constitutionally required in every parental status proceeding, although "[a] wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution"). The impartial administration of justice by our Nation's courts is best served when litigants have access to counsel. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("An informed, independent judiciary presumes an informed,

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[3] IOLTA programs are critical to the States in ensuring equal access to the courts through the provision of legal services to indigent persons. IOLTA programs generated over $148 million nationwide in the year 2000 through interest on nominal or short-term client funds – funds that would otherwise have remained unproductive in non-interest-bearing accounts. IOLTA Handbook at 95.

independent bar."). These are the ends that amici States seek to further under their respective IOLTA programs.

SUMMARY OF ARGUMENT

Since the Takings Clause, at its core, concerns fairness and justice, this Court has been very reluctant to adopt new *per se* rules that jettison the weighing of factors articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). That reluctance is particularly justified in this case, where petitioners are attempting to use the Takings Clause not to obtain "just compensation," but to override the decisions of each and every state in the Union. Petitioners' attempt to expand *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) – which held that a regulation imposing a physical occupation of real property was a *per se* taking – to the Washington IOLTA rule – which involves only intangible personal property and imposes absolutely no financial burden on petitioners – simply goes too far.

Moreover, in seeking injunctive relief where they have suffered no damage or loss, petitioners seek to transform the compensatory Takings Clause into a new, substantive limit on government power. This transformation is not authorized by the plain language of the Fifth Amendment or by decisional law. Petitioners' remedy for an alleged taking of their property is a state court action for determination of just compensation. That just compensation might be nothing, because petitioners have suffered no loss, does not allow petitioners to invoke federal power to enjoin the IOLTA program.

ARGUMENT

I. THE *PER SE* TAKINGS RULES SHOULD NOT BE EXTENDED TO A REGULATION GOVERNING FUNDS THAT CANNOT PRODUCE NET INTEREST FOR THE PROPERTY OWNER.

A. Application of a *Per Se* Test to IOLTA Funds Would Be an Unwarranted Extension of the Present Categorical Tests, Which Derive From the Unique Nature of Property Interests in Land.

The "polestar" for determining whether a governmental regulation constitutes a taking is the ad hoc factual inquiry outlined in *Penn Central Transp. Co.*, 438 U.S. at 104, 123-24. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1486 (2002), *quoting Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). This Court has carved out only two narrow exceptions to the fact-specific review set forth in *Penn Central*. First, regulations that result in a "permanent physical occupation" of property will be deemed to result in a taking "without regard to other factors that a court might ordinarily examine." *Loretto*, 458 U.S. at 419, 432. Second, such "categorical treatment" is also appropriate "where regulation denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Both exceptions derive from recognition of the unique value of land and, consequently, provide no justification for extending *per se* treatment to the regulation of client trust accounts.

Loretto reviewed a regulation that mandated the permanent, physical occupation of real property – the

placement of cable television equipment in private apartment buildings. The Court explained that the complex weighing of *Penn Central* factors was unnecessary because "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." 458 U.S. at 426-27. *Loretto* described a permanent physical occupation of property as "qualitatively more intrusive than perhaps any other category of property regulation," *id.* at 346, and noted that "[e]arly commentators viewed a physical occupation of real property as the quintessential deprivation of property." *Id.* at 430 n.7. The Court stressed that its exception to the generally applicable analysis set forth in *Penn Central* was "very narrow," *id.* at 441, and should not raise significant evidentiary problems because "[t]he placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." *Id.* at 437. *See also Tahoe-Sierra Preservation Council*, 122 S.Ct. at 1479 (noting that "physical appropriations are relatively rare [and] easily identified").

The Court has steadfastly refused to apply the *per se* rule articulated in *Loretto* beyond the required, permanent, physical occupation of real property. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 530 (1992). In particular, the Court has declined to extend the rule to laws that create monetary liability or allegedly "take" money, finding the rule's rationale – that the physical invasion of one's land is particularly grievous – plainly inapplicable. In *United States v. Sperry Corp.*, 494 U.S. 52 (1989), the Court held that the deduction of a percentage fee by the United States from monetary awards was not a taking, where the deduction was designed to offset the government's administrative costs. Citing *Loretto*, the claimant

argued that "[t]he deduction was akin to a 'permanent physical occupation' of its property and therefore was a *per se* taking requiring just compensation, regardless of the extent of the occupation or its economic impact." *Id.* at 62 n.9. The Court unanimously rejected the claimant's attempt to equate the occupation of real property with a fee requirement, finding it "artificial to view deductions of a percentage of a monetary award as physical appropriations of property. *Unlike real or personal property, money is fungible.*" *Id.* (emphasis added).[4] *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 530 (1998) (plurality) (retroactive monetary liability "is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a *per se* taking").

The effect of IOLTA rules is neither similar nor analogous to the permanent physical occupation of real property discussed in *Loretto*, 458 U.S. at 434. There, a *per se* rule dispensed with the normal review of investment-backed expectations because "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." *Id.* at 436. Petitioners, however, have never had an expectation of undisturbed possession of the potential interest generated by the IOLTA accounts.[5] Petitioners identify no

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[4] *Cf. Bowen v. Massachusetts*, 487 U.S. 879, 919 n.3 (1988) (Scalia, J., dissenting) ("Suit for a sum of money is to be distinguished from suit for specific currency or coins in which the plaintiff claims a present possessory interest. . . . Respondent seeks *fungible funds*, not any particular notes in the United States Treasury.") (emphasis added).

[5] In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), upon which petitioners rely, the fact that "Webb's creditors . . . had more than a unilateral expectation" of receiving interest –

(Continued on following page)

scenario – because there is none – under which their short-term or nominal funds on deposit with counsel could have earned net interest for them. And prior to the adoption of IOLTA rules, the potential interest simply redounded to the benefit of the bank. Thus, in sharp contrast to the owners of real property, IOLTA clients never had any expectation that they would have "undisturbed . . . possession" of pooled account interest.

Moreover, *Loretto* justified applying a *per se* rule to physical occupations, regardless of the extent of economic impact, because economic impact would be addressed later on remand when the state court determined just compensation. *Loretto*, 458 U.S. at 437-38. In our case, however, petitioners' *per se* rule would do much more than "determin[e] whether there is a taking in the first instance." *Id.* at 438. Petitioners seek to use a *per se* rule to avoid consideration of whether compensation is due because their economic loss is zero. (Pet. App. 41a). But that very compensation determination is what makes the application of a *per se* rule, as opposed to the usual *Penn Central* analysis, acceptable in certain limited circumstances. *Loretto*, 458 U.S. at 437-38.

This Court's decision in *Lucas* also emphasized the unique role of land – and the very different treatment of personal property – under the Takings Clause. The Court explained that, in contrast to land, "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealing, [the owner] ought to be

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indeed over $100,000 in interest – from an interpleader account was critical to the Court's finding a taking.

aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." 505 U.S. at 1027-28. Petitioners' *per se* rule would ignore the carefully crafted limitation on the categorical rule for land articulated in *Lucas*.

B. A *Per Se* Taking Should Never Be Found Where, as Here, Application of the Traditional Ad Hoc Balancing Test Would Produce a Different Result.

In cases within the narrow rules outlined in *Loretto* and *Lucas*, the weighing of factors called for by *Penn Central* is unnecessary because the existence of a taking is obvious. As petitioners themselves concede, "the *per se* test truncates the fuller *Penn Central* analysis of all surrounding factors only where those factors cannot possibly alter the conclusion that a taking has occurred." Pet. Br. 16.

Due to the danger that categorical approaches will lead to unjust results, this Court very recently reiterated its concerns about creating or expanding *per se* takings rules. In *Tahoe-Sierra Preservation Council*, the Court emphasized that "[t]he 'temptation to adopt what amount to per se rules in either direction must be resisted.'" 122 S.Ct. at 1489, quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring). The Court rejected a request that it adopt a *per se* rule for reviewing planning moratoria as "simply 'too blunt an instrument'" for identifying cases in which a taking has occurred. *Id.* at 1489, quoting *Palazzolo*, 533 U.S. at 628.

Application of the *Penn Central* factors to the Washington State IOLTA rule demonstrates that there is no

taking in this case. As discussed in respondents' briefs, those factors – especially the absence of any economic impact on the client and the lack of any "reasonable investment-backed expectation" that interest on small or very short-term accounts would be both unregulated and would inure to the client – demonstrate that no taking has occurred under *Penn Central*. It would, therefore, be unjust to find a taking under a truncated *per se* test.

Moreover, a *per se* rule in this case would clash with the guiding principle for evaluating takings claims, *i.e.*, that "some people alone" should not be singled out "to bear public burdens" which in fairness should be borne by the general public. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Petitioners turn *Armstrong* on its head. Petitioners themselves point out that any alleged burdens resulting from IOLTA programs are so small that they "may go unnoticed and unopposed," (Pet. Br. 32); and indeed there is no economic burden. IOLTA programs are effective because they apply to large numbers of people and rely on pooling of minuscule amounts of money obtained from each individual deposit.[6] Petitioners therefore contort *Armstrong* when they assert that IOLTA programs are not only takings, but *per se* takings.

[6] The Washington program, for example, generates roughly $3,000,000 per year (Pet. App. 7a) by accumulating the gross interest from a very large number of deposits, such as petitioner Brown's alleged $5 in interest (Pet. App. 34a).

C. Petitioners' *Per Se* Rule Would Disregard a Consensus Among the States and Invite Judicial Oversight of State Policy Choices.

In a remarkable display of consensus, each of the fifty States has enacted a statute or rule that requires or permits attorneys to establish IOLTA accounts from which interest is distributed to support programs that advance the administration of justice. Against this background, petitioners' argument that there is a confiscatory "character" in this governmental action that "alone" demonstrates "the Washington IOLTA program to be a *per se* taking," is incongruous and unsupportable. *See* Pet. Br. 15. The Court should firmly reject petitioners' invitation to announce a categorical rule so at odds with the reasonable determinations of the fifty States.[7]

To date, *per se* takings rules have been reserved for circumstances in which the government destroys a fundamental, well-established property right. *See Loretto*, 458 U.S. at 435 (permanent physical occupation of property is "perhaps the most serious form of invasion of an owner's property interests"); *Lucas*, 505 U.S. at 1028 (elimination of "all economically valuable use" of land "is inconsistent

[7] The great majority of the States established their IOLTA programs through a rule adopted by the State's highest court. *Phillips*, 524 U.S. at 159-60 n.1. When a State's highest court promulgates rules regulating the practice of law, the court rules constitute "state" policy in the same manner as legislatively-enacted programs. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734 (1980) (finding that Virginia Supreme Court exercised "the State's entire legislative power with respect to regulating the Bar").

with the historical compact recorded in the Just Compensation Clause that has become part of our constitutional culture"). That IOLTA rules upset no similarly settled expectations is reflected in the considered judgments of the courts and legislatures of the fifty States that have implemented the rule. *See, supra,* at 2-3.[8] Because a national consensus has developed affirming the propriety of attorneys' maintaining IOLTA accounts, petitioners cannot credibly maintain that the "character" of the programs is so repugnant to existing property rights and expectations that a *per se* taking must be found.

Moreover, petitioners' *per se* rule would override the will of a State based exclusively on judicial evaluation of the "character" of an IOLTA rule, bypassing evaluation of more objective factors such as the rule's economic impact and whether it upsets clients' reasonable investment-backed expectations. So enlarging the reach of the Takings Clause would seriously undermine the "[d]ual sovereignty" that "is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S. Ct. 1864, 1870 (2002). Indeed, because petitioners are patently unable to demonstrate any economic loss under the Washington IOLTA rule, their challenge to the "character" of the IOLTA program reduces to nothing more than their personal disagreement with the important public purposes it serves. Petitioners now ask the Court to enshrine this

[8] These determinations accord with settled common law under which a trustee has no obligation to pay interest to a beneficiary unless the principal in the trust earns interest that exceeds the costs of trust administration. 2A Scott on Trusts, §§ 181, 182 (1987 and 2002 Supp.).

disagreement in a *per se* rule under the Takings Clause. But the Court has long recognized that it does not "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut* 381 U.S. 479, 481-82 (1965). *Cf. Williamson v. Lee Optical of Oklahoma, Inc.* 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . "). The Court should reject petitioners' proposed *per se* rule as a direct invitation to improper judicial review of the reasonable policy choices of the States in enacting IOLTA programs.

D. If a *Per Se* Test Is Extended to Rules, Like IOLTA, That Affect Only the Use of Intangible Personal Property But Have No Economic Impact, Virtually Any Police Power Regulation Could Be Subject to Challenge Under the Takings Clause.

The application of a *per se* taking rule to the Washington IOLTA program – which imposes no financial burden on clients – would disrupt established government practice to an extraordinary degree. Indeed, the Court has "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values" without effecting a taking. *Penn Central Transportation Co.*, 438 U.S. at 124. Petitioners' proposed rule contravenes this precedent.

Petitioners' attempt to limit their *per se* rule to alleged appropriations of money is wholly unhelpful. In *Sperry*

Corp., the Court observed that a categorical takings rule for monetary exactions may have untoward results, stating: "If the deduction in this case was [construed to be] a physical occupation, so would be any fee for services. . . ." 493 U.S. at 62. Petitioners' expansive rule could implicate any direct or indirect financial assessment by the government – a long list that could extend from general taxes and user fees to mandatory bar dues, public library fines and parking tickets – even though the Court has rejected claims asserting an uncompensated taking in many such circumstances. *See, e.g., City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 376 (1974) (rejecting claim that 20% gross receipts tax on commercial parking lots was a taking, even if the tax was "so high as to threaten the existence of an occupation or business").[9] Petitioners' proposed rule would also call into question settled modes of business regulation, such as laws restricting rates companies charge to consumers or rents landlords charge tenants, even though these laws have routinely been upheld against constitutional challenges. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 768-70 (1968)

[9] *Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995), illustrates one of many takings claims that would spring from petitioners' *per se* rule. There, a bank asserted that the government's seizure of assets to offset losses of another bank owned by the same bank holding company constituted a *per se* taking. The court rejected the claim, explaining that the taking of money through taxes or assessments has never been subject to a *per se* analysis by this Court: "[E]ven though taxes or special municipal assessments indisputably 'take' money from individuals or businesses, assessments of that kind are not treated as *per se* takings under the Fifth Amendment." *Id.* at 1576-77 (collecting Supreme Court cases rejecting takings challenges to taxes and assessments).

(upholding natural gas rate setting); *Bowles v. Willingham*, 321 U.S. 503, 516-19 (1944) (rejecting takings challenge to rent control).

Petitioners urge that the State effects a *per se* taking even when its regulation of client trust accounts affects only non-economic interests – namely, the right "to control the uses to which their property is put." Pet. Br. 33, 35. Virtually *any* regulation of client trust accounts under a State's code of professional responsibility – indeed, even the simple requirement that such funds be maintained in a bank, as opposed to the office safe – affects such a right to control uses. Petitioner's proposed *per se* rule would thus significantly disrupt amici States' traditional authority to regulate the practice of law. *See Leis*, 439 U.S. at 442.

Petitioners' proposed *per se* rule would frustrate even well-settled uses of the police power to protect public health, safety and welfare, and would leave the States entirely unable to gauge the limits of their regulatory authority. If, as petitioners argue, a *per se* taking can be found based purely on the "character" of a governmental action, federal courts will be asked to sit in review of the "character" of virtually any regulation that affects an owner's use of property, but does not diminish the property's value or the owner's actual (or even potential) return on investment. Such an expansion of the *per se* takings doctrine "would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power." *Tahoe-Sierra Preservation Counsel*, 122 S.Ct. at 1485. Petitioners' proposed rule is utterly out of place in the Court's settled takings jurisprudence, and should be rejected.

II. THERE IS NO CONSTITUTIONAL VIOLATION TO BE REMEDIED THROUGH INJUNCTIVE RELIEF.

A. The Takings Clause Is a Compensatory Constitutional Provision Rather Than a Substantive Limit on Government Power.

The Fifth Amendment's Takings Clause does not ban government from taking private property for public use. Rather, the Fifth Amendment conditions the right to take private property for public use on payment of "just compensation" for the property taken.[10] "This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original).

The compensatory nature of the Takings Clause was recently emphasized by the Court in *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999). There, the Court recognized that so long as a compensatory remedy exists, the Fifth Amendment is not violated:

> The constitutional injury alleged, therefore, is not that property was taken but that it was

[10] This does not mean that there are no limits on the government's right to take property. The Fifth Amendment requires that private property be taken only for a "public use." The Due Process Clauses of the Fifth and Fourteenth Amendments provide additional limitations on government's power to take and use private property. These other substantive limitations are not, however, before the Court in this case.

> taken without just compensation. Had the city paid for the property or had an adequate post-deprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone.

Id. at 709. The Court observed this same principle in *Williamson Planning Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), in considering the ripeness of a takings claim for adjudication: "Because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied." *Id.* at 194.

Nevertheless, petitioners focus on injunctive relief rather than compensation, thereby revealing their real agenda: using the Takings Clause to challenge governmental policy with which they disagree. As pointed out by Justice Kennedy, however, the judiciary should invoke the Takings Clause only to ensure that property owners are compensated for the taking of their property, but not to review the validity of governmental policy:

> The imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980) (zoning constitutes a taking if it does not substantially advance legitimate state interests). This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, *which has not been understood to be a substantive or absolute limit on the Government's power to act*. The Clause operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge. The Clause

> presupposes what the Government intends to do is otherwise constitutional. . . .

Eastern Enterprises v. Apfel, 524 U.S. at 545 (Kennedy, J., concurring in the judgment and dissenting in part) (emphasis added). Thus, petitioners' request for injunctive relief against the Washington IOLTA Program is entirely misplaced, given that the Takings Clause is not intended to limit government's ability to act, but is instead intended only to ensure that government pay for the impacts of certain actions.

B. There Is No Unconstitutional Taking Within the Meaning of the Takings Clause Unless the Property Owner Is Entitled to Just Compensation.

In urging that injunctive relief is an appropriate remedy in this case, petitioners seek to edit the twelve-word Takings Clause to nine by excising the requirement that prohibited takings be "without just compensation." This edit allows petitioners to interpose injunctive relief as a "remedy" for their novel constitutional claim. But it is not enough that petitioners assert that there has been a deprivation of a property interest; to establish a constitutional injury they must also show that the deprivation has been "without just compensation." Where just compensation is zero, there is no Takings Clause injury, and no ground for providing injunctive relief under that clause.

This conclusion is compelled by "the guiding principle of just compensation," which is to put the property owner "'in as good a position pecuniarily as if his property had not been taken.'" *United States v. Virginia Electric Co.*,

365 U.S. 624, 633 (1961), quoting *Olson v. United States*, 292 U.S 246, 255 (1934). The Takings Clause thus requires a financial loss. And it is solely concerned with the *owner's* loss. *See Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) ("[The question is] What has the owner lost? not, What has the taker gained?"). A necessary corollary is that there is no constitutional guarantee that the owner of property taken by the government is entitled to a remedy under the Takings Clause; the owner must show that she suffered a pecuniary loss to invoke that clause.

Although in most instances when government takes private property for public use the owner loses a property interest of some value, this is not always the case. This Court recognized the possibility of a government taking of property where no compensation is due, and thus no Takings Clause violation occurs, in *Marion & R.V.R. Co. v. United States*, 270 U.S. 280 (1926). In *Marion*, the Court considered whether a federal order authorizing government use of railroads during World War I constituted a taking of the Marion Railroad's property. Justice Brandeis, writing for a unanimous Court, found it unnecessary to consider whether a taking had occurred because, even if the government did take the railroad's property, no compensation was due for the taking. "Nothing was recoverable as just compensation because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss." *Id.* at 282. Underscoring the fact that the Takings Clause is a compensation clause, *Marion* went on to stress that there was "[n]o evidence . . . that the alleged taking had subjected the company to any pecuniary loss or had deprived it of anything of pecuniary value." *Id.* at 286.

A common circumstance where government takes property but owes nothing as just compensation is the taking of easements appurtenant to a dominant estate. Where the easement taken is not needed by the dominant estate, such as where the easement grants a right to ingress and egress and other methods of ingress and egress are available, the value of what is taken from the owner of the easement will be small or non-existent, even if the gain to the government in obtaining the easement is great. In these cases, the owner of the easement cannot enjoin the government project. The owner instead essentially receives nothing as just compensation. *See, e.g., Gilmore v. State*, 143 N.Y.S.2d 873 (Ct. Cl. 1955) (nominal compensation of $1.00 for condemnation of easements and rights of way of no benefit to landowners); *Redevelopment Agency v. Tobriner*, 215 Cal.App.3d 1087 (1989) (court ordered nothing as just compensation for condemnation of valueless nonexclusive easements); Restatement (First) of Property, § 508, com. c, illus. 2 (market value of dominant estate not affected by taking of easement since public way established by condemnation is fully as serviceable as easement right of way; owner of dominant estate entitled to no award for taking of easement).

The principle that the remedy for a taking of property is compensation that represents the pecuniary loss, if any, suffered by the owner is also illustrated in *Loretto*. The Court's remand in *Loretto* for a determination of just compensation, without discussion of equitable relief to bar enforcement of the statute, points to an understanding that a taking by itself warrants no "remedy" other than a

determination of just compensation.[11] The mere fact that the property owner's loss as a result of a taking is small or non-existent does not change the basic stricture of the Fifth Amendment that only those takings that are without "just compensation" are prohibited.

C. Injunctive Relief Is Unavailable Because the Washington State Courts Can, and Should, Decide Any Question of Just Compensation.

Petitioners have suffered no loss as a result of the IOLTA program and thus are due no compensation. If there is any question that this is the case, however, petitioners' remedy is not injunctive relief. Rather, their remedy is a state court action for determination of the amount, if any, of compensation due.

The general rule regarding the unavailability of injunctive relief in takings cases was established in *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1016 (1984): "Equitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."

There is only one circumstance where this Court has indicated that injunctive relief might be available to

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[11] The subsequent history of *Loretto* reveals that the statutory nominal compensation of $1.00 was more than enough to compensate Loretto for the minor physical invasion of her property. *See Loretto v. Group W. Cable*, 522 N.Y.S.2d 543, 546 (Sup. Ct. 1987).

address an otherwise legitimate taking: where no mechanism exists to obtain just compensation. *See, e.g., Preseault v. ICC*, 494 U.S. 1, 13 (1990) ("All that is required is the existence of a reasonable, certain and adequate provision for obtaining just compensation at the time of the taking"); *cf. Eastern Enterprises*, 424 U.S. at 521 (plurality) (injunction permitted where "monetary relief against the government [was] not an available remedy").[12] Although petitioners base their request for injunctive relief in part on the asserted lack of an adequate provision in Washington's IOLTA program for obtaining just compensation, it is simply not true that petitioners lack a *mechanism* for determination of just compensation. Property owners can seek just compensation in state court. *See, e.g., Sintra v. City of Seattle*, 829 P.2d 765 (Wash. 1992). Moreover, it is petitioners' burden to demonstrate that the state inverse condemnation procedure is "unavailable or inadequate"; until they have "utilized that procedure," petitioners have no right to relief. *Williamson Planning Commn.*, 473 U.S. at 196-97; *cf. Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 14-15 (1987) (federal plaintiff challenging state court post-judgment procedures has burden to show that state law barred presentation of its claim).

[12] The Court did not establish a general rule that injunctive relief is appropriate to address a taking in *Babbitt v. Youpee*, 519 U.S. 234 (1997). Although the Court affirmed the lower court's entry of declaratory and injunctive relief in *Youpee*, the parties did not raise and the opinion does not address, explain or discuss the propriety of injunctive relief to address a taking. The affirmance regarding remedy is therefore best viewed as dicta rather than a new rule that property owners may choose either injunctive relief or just compensation in response to a government taking.

As the Court recognized in *Williamson*, 473 U.S. at 194-95 and n.14, the channeling to state court of suits alleging injury to property is analogous to the *Parratt-Hudson* doctrine in the procedural due process context. *See Parratt v. Taylor*, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984). Under that doctrine, as here, state courts are the proper venue where parties allege state-caused injuries to property and "there is no federal wrong unless the state judicial system is unavailable." *SGB Financial Services, Inc. v. City of Indianapolis*, 235 F.3d 1036, 1038 (7th Cir. 2000) (Easterbrook, J.). Federal involvement is reserved for situations where no adequate state process is available to address the injury. *See Albright v. Oliver*, 510 U.S. 266, 284-85 (1994) (Kennedy, J., joined by Thomas J., concurring in judgment); *Zinermon v. Burch*, 494 U.S. 113, 139-151 (1990) (O'Connor, J., dissenting).

It would particularly disturb sovereign state interests to permit petitioners to bypass the state court in favor of federal injunctive relief. Although petitioners do not specify the form of equitable relief they seek, the likely possibilities are problematic. A federal court order that limits or restructures the IOLTA program – especially by a claim under the Takings Clause – would offend core principles of comity and federalism. *See Rizzo v. Goode*, 423 U.S. 362, 378 (1976) ("Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'"), quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951). Any effort to obtain a compensation determination in federal court, either directly, or indirectly through an injunction, would

be barred by the Eleventh Amendment. *See Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400 (1979). *See also* Pet. Br. 45 n.23 (noting Eleventh Amendment bar to federal court suit against a State for compensatory relief).

Petitioners cannot show that Washington lacks a state court mechanism for determination of just compensation. Nor can petitioners show that Washington state courts will not follow this Court's Takings Clause jurisprudence such that federal intervention enjoining the IOLTA program is warranted. Rather, it appears that petitioners' real concern is not that they lack a mechanism for determination of just compensation, but that just compensation in their case will be nothing. That fact does not, however, allow them to bypass a state court determination of this issue and invoke federal equitable power to limit the State's IOLTA program. *Cf. SGB Financial Services, Inc.*, 235 F.3d at 1038. As long as a state procedure is available, as it is here, petitioners are not entitled to federal injunctive relief.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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